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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930.

No. ~~664~~ 47

FULLERTON LUMBER COMPANY, PETITIONER,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1930

CERTIORARI GRANTED MARCH 17, 1930

(34,795)

(34,795)

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, Plaintiffs,

vs.

Fullerton Lumber Company, a Corporation, Defendant

Complaint—Filed Dec. 9, 1927

For their complaint herein, plaintiffs allege:

I

That the defendants herein is a corporation organized and existing under and by virtue of the laws of the state of South Dakota, having its principal place of business at Minneapolis, Minnesota.

II

That the Chicago, Milwaukee & St. Paul Railway Company is a corporation organized and existing under the laws of the state of Wisconsin by law authorized to operate, and until the 18th day of March, 1925, operating various lines of railway in the states of Minnesota, Illinois, Wisconsin, South Dakota and other states, as a common carrier of merchandise by rail for hire, including a line of railway extending from Chicago, in the State of Illinois, to the City or Station of Kimball in the State of South Dakota.

III

That on the 18th day of March, 1925, in a cause then pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein

Binkley Coal Company was plaintiff and the said Chicago, Milwaukee & St. Paul Railway Company was defendant, an order was duly made and entered appointing the above [fol. 2] named plaintiffs as receivers of all and singular the railroads and other property and assets, real, personal and mixed of every kind and description and wherever situated belonging to the said Chicago, Milwaukee & St. Paul Railway Company and authorizing and directing said receivers to manage and operate said railroads and property according to the requirements of the valid laws of the various states in which such railroads and property are situated, in the same manner that Railroad Company would be bound to do if in possession thereof; and further authorizing and empowering said Receivers to institute and prosecute in any court all such actions in their judgment necessary for the proper discharge of their trust as such Receivers.

IV

That thereafter and on the same day, in proceedings in aid of such receivership ancillary to the aforementioned cause, instituted in the District Court of the United States, for the District of Minnesota, Fourth Division, between the same parties, an order was duly made and entered appointing the above named plaintiffs as receivers with power and authority as aforesaid.

V

That thereafter and before the commencement of this action, the plaintiffs herein duly qualified and entered upon the discharge of their duties pursuant to each of said orders and have ever since been and now are acting as such receivers.

VI

That since the 18th day of March, 1925, plaintiffs as such receivers have at all times been in the control of and operating the lines of railway of said Railway Company pursuant to said orders, as a common carrier of freight in interstate commerce, for hire, and as such have complied with the requirements of the act of Congress entitled "An Act to Regulate Commerce" passed on February 4, 1887

and amendments thereof and supplements thereto; and have at all times complied with said acts, particularly with reference to the filing and publishing of tariffs fixing the rates for transportation of freight and regulations governing the application thereof.

VII

That this action arises and is based upon the act above mentioned and amendments thereof and supplements thereto.

[fol. 3]

VIII

That at Norfolk, West Virginia on or about the 9th day of June, 1926, Sastner, Curran & B delivered to the Norfolk and West Virginia Railway 10,400 lbs. of coal contained in N&W car 93360 for transportation over its line of railway and its connecting common carriers, including the line of railway of the plaintiffs above named, to Kimball, South Dakota. That said coal was billed and consigned to the defendant at Kimball, South Dakota.

That the said coal was duly transported by the Norfolk and West Virginia Railway and its connecting common carriers, including the plaintiff, to said Kimball, and on the 16th day of June, 1926, said coal was duly delivered to the defendant at said Kimball by the plaintiffs who were the delivering common carrier.

That the lawful charges due for such transportation at the time of said delivery to the said Fullerton Lumber Company at said Kimball was and is the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars, no part of which has been paid and said Three Hundred Seventy-five and 96/100 ($375.96) Dollars is due and unpaid, said charges being shown more in detail in "Exhibit A" hereto attached and made a part hereof the same as though set out in full.

IX

That the defendant by reason of the foregoing became and now is lawfully indebted to the plaintiffs in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dol-

lars with interest thereon since the 16th day of June 1926.

Wherefore plaintiffs demand judgment against the defendant in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars with interest thereon as aforesaid, together with their costs and disbursements herein.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs, 25 Milwaukee Station, Minneapolis, Minnesota.

[fol. 4] EXHIBIT "A" TO COMPLAINT

Delivery Receipt Form 72-T.W.

8629 Kimball, S. D.

Station 6/16 1926

Consignee Fullerton Lbr. Co. Freight

Destination Bill No. 374

Route N&W — Cels PH Chgo CM&STP

(Point of origin to destination)

Received of Chicago, Milwaukee & St. Paul Railway, the following described Articles in Good Order:

H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

Waybilled from	Waybill Date and No.	Full Name of Shipper	Car Initials and Number
Norfolk, W. Va.	6/9 1937	Castner, Curran & B	N&W 163300
Point and date of shipment.	Connecting Line reference.	Previous Waybill references.	Original car initials and number.

Number of packages, Articles and Marks	Weight	Rate	Freight	Advances	Total
Rom Coal	10400	72 3	375.96		
Wghts as Pert — Ohio 1342					
410					
1022					
R/W Mitchell 1115					
410					
1040					
			Total		375.96

Date of Delivery 6/16 1926.

Receipt of Property Acknowledged:

Fullerton Lbr. Co., consignee
Per J. E. Yaresh

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Jan. 3, 1928

For its Answer to the Complaint herein Defendant alleges as follows:

I

Admits the allegations contained in Paragraphs I, II, III, IV, V, thereof.

[fol. 5]

II

Admits that since March 18th, 1925, Plaintiffs have been in control of and operating the lines of railway of the Chicago, Milwaukee & St. Paul Railway Company, as a common carrier in interstate commerce, for hire, and alleges that Defendant has no knowledge or information sufficient to constitute a belief as to all other matters alleged in Paragraph VI of said Complaint and Defendant therefore denies the allegations of Paragraph VI of said Complaint, except as herein specifically admitted.

III

Defendant denies the allegations of Paragraph VII of said Complaint.

IV

Admits that a carload of coal was transported substantially as alleged in Paragraph VIII of said Complaint, in subparagraphs one and two of said Paragraph VIII, except that Defendant denies that said car was duly transported and alleges that the manner and form in which the same was transported by Plaintiffs or their agents was negligent and caused loss and damage thereon and that said loss and damage was paid for by Plaintiffs.

Except as herein expressly admitted, Defendant denies the allegations contained in Paragraph VIII of said Complaint.

V

Denies the allegations of Paragraph IX of said Complaint.

VI

Defendant specifically denies that it is indebted to Plaintiffs in any sum whatsoever, whether on account of the matters in said Complaint alleged or otherwise, and Defendant alleges that before this action was brought De-

fendant fully paid and satisfied and discharged the claim in said Complaint alleged by full and complete payment thereof, and of the whole thereof, less a deduction agreed upon between the parties and paid by Plaintiffs to Defendant on account of improper carriage of said carload or coal and because of improper overcharge therefor.

VII

Denies each and every allegation, matter, statement and thing in said Complaint contained, save as herein admitted, qualified, or otherwise alleged.

[fol. 6] Wherefore Defendant prays that Plaintiffs take nothing on account of the matters alleged in said Complaint, that the same be dismissed, together with costs and disbursements to Defendant. Dated, January 3, 1928.

Stanley S. Gillam, Attorney for Defendant, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota.

(Endorsed:) Service admitted this 3rd day of January, 1928. F. W. Root, C. O. Newcomb, & A. C. Erdall.

[File endorsement omitted.]

In United States District Court

Stipulation for Filing of Reply and Order Thereon

It is hereby stipulated by and between the above entitled parties that the attached Reply of the plaintiffs may be filed in the office of the Clerk of the above entitled Court without further notice to the defendant.

Dated February 6, 1928.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs. Stanley S. Gillam, Attorney for Defendant.

Order

Pursuant to the above stipulation it is hereby ordered that the Clerk of this Court may, and he is hereby directed

to file in his office as a part of the record in the above entitled case the attached Reply.

By the Court:

Wm. A. Cant, Judge.

Dated February 16, 1928.

In United States District Court

Reply—Filed Feb. 16, 1928

Come now the plaintiffs and for their reply to the answer of the defendant herein, allege and show as follows:

[fol. 7]

I

Allege that in the afternoon of Saturday, the 19th day of June, 1926, one of the defendant's agents delivered to the plaintiffs' Agent at Kimball, South Dakota, defendant's check No. 738, dated June 19, 1926, in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars, payable to the Chicago, Milwaukee & St. Paul Railway. That said check, marked "Exhibit B" including all endorsements is hereto attached and made a part hereof, the same as though set out in full. That said check was duly presented to the Lombard State Bank, the bank upon which said check was made, and said Bank refused payment upon said check.

II

Plaintiffs further allege that they have never received any money whatsoever on said check and have never received the freight and other charges on said shipment, although they duly demanded that the defendant herein pay said charges before the commencement of this suit.

III

Save as hereinbefore specifically admitted or alleged plaintiffs deny each and every allegation, matter, fact and thing contained in the answer of the defendant herein.

Wherefore, plaintiffs pray for judgment as in their complaint demanded.

Dated February 6, 1928.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs, 25 Milwaukee Station, Minneapolis, Minnesota.

EXHIBIT "B" TO REPLY

Face of Check

9 No. 738.

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

6/19/1926.

Pay to the order of C. M. & St. P. Ry. Co. $375.96 Three Hundred Seventy Five and 96 100 Dollars.

[fol. 8] Collectible at par through the Federal Reserve Bank of Minneapolis

To the Lombard State Bank, 78-196 Kimball, South Dakota.

Fullerton Lumber Company, by J. E. Yarosh.

Back of check: G. T. Gustafson, Agt. C. M. & St. P. Ry., 8629 Kimball, S. D. Pay to the Order of any Bank, Banker or Trust Co. All prior endorsements guaranteed Jun 23, 1926. Federal Reserve Bank 17-8 Minneapolis 17-8. Cancelled 17. Pay to the order of any Federal Reserve Bank. Jun 22, 1926. Central Trust Company of Illinois, Chicago, Illinois. 2-23. C. C. Haftner, Assistant Cashier. Pay to the Order of Central Trust Company of Illinois, Chicago, Illinois. For Credit to A. H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago, Milwaukee & St. Paul Railway Company, A. G. Loomis, Treasurer, Receivers. Cancelled.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY AND AS TO CERTAIN FACTS—
Filed Nov. 13, 1928

It is hereby stipulated by and between the above entitled parties that the above case may be tried before the above entitled Court without a jury and jury is waived by each of said parties.

[fol. 9] It is further stipulated by and between the above entitled parties that since the commencement of said action, all of the property of the Chicago, Milwaukee & St. Paul Railway Company, which was under the control and being operated by H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the said Railway, including choses in action and unliquidated claims, were duly sold, assigned and delivered to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation duly organized and existing under and pursuant to the laws of the State of Wisconsin.

It is further stipulated that since the 13th day of January 1928 all of the property formerly owned by the said Chicago, Milwaukee & St. Paul Railway Company has been and now is being operated and is now owned and controlled by the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

It is further stipulated that all the right, title and interest of H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the Chicago, Milwaukee & St. Paul Railway Company and of the said Chicago, Milwaukee & St. Paul Railway Company, is now and ever since the said 13th day of January has been vested in the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

And it is stipulated that the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company may be substituted as plaintiff in place of the above entitled plaintiffs and judgment, if any shall be ordered in favor of said plaintiffs, may be entered in favor of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and any judgment, if any shall be ordered in favor of the defendant, may be entered as

against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Dated November 13, 1928.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs. Stanley S. Gillam, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY PLAINTIFF—Filed Nov. 13, 1928

Pursuant to the above entitled stipulation it is hereby Ordered that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company is hereby substituted as plaintiff in the [fol. 10] above entitled case in place of H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the Chicago, Milwaukee & St. Paul Railway Company; in the event that it is found that the above entitled plaintiffs or their substituted plaintiff are entitled to judgment in said case, in such event judgment shall be entered in favor of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and it is further ordered that if judgment in this case shall be found to be in favor of the above entitled defendant, judgment shall in such case be entered as against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the substituted plaintiff.

Dated November 13, 1928.

Chas. A. Dewey, Judge U. S. District Court.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL NOVEMBER 13, 1928

Before Judge Charles A. Dewey

The above entitled action came on this day to be tried to the Court; the plaintiff herein appearing by A. C. Erdall, Esq., and the defendant appearing by Stanley S. Gillam, Esq.

Mr. Erdall states the case to the Court on the part of the plaintiff.

Mr. Gillam states the case to the Court on the part of the defendant.

Forest T. Gustafson is sworn, is examined and testifies as a witness on the part of the plaintiff.

John Dickie is sworn, is examined and testifies as a witness on the part of the plaintiff.

Forest T. Gustafson is recalled, is examined and further testifies as a witness on the part of the plaintiff.

Here the plaintiff rests its case.

J. E. Yarosh is sworn, is examined and testifies as a witness on the part of the defendant.

Here the defendant rests.

[fol. 11] Forest T. Gustafson is recalled, is examined and further testified as a witness on the part of the plaintiff.

John Dickie is recalled, is examined and further testifies as a witness on the part of the plaintiff.

Here the plaintiff again rests its case and the testimony is closed.

Mr. Erdall sums up the case to the Court in part on behalf of the plaintiff.

Mr. Gillam sums up the case to the Court in part on behalf of the defendant.

Mr. Erdall concludes the summing up of the case to the Court on behalf of the plaintiff.

Mr. Gillam concludes the summing up of the case to the Court on behalf of the defendant.

Said case is submitted to and taken under advisement by the Court;

Plaintiff to file a brief and defendant to file its brief on or before November 19th, 1928.

Filed November 13, 1928. Joel M. Dickey, Clerk By Thomas H. Howard, Deputy.

IN UNITED STATES DISTRICT COURT

No. 2091. At Law

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

FULLERTON LUMBER COMPANY, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Nov. 20, 1928

The above entitled action having come on for hearing on its merits in open court on the 13th day of November, 1928, [fol. 12] before the court without a jury, a jury having been duly waived by the parties in writing, evidence is introduced and the cause argued and submitted, and the same having been duly considered the Court makes the following findings of fact and law:

That since the commencement of this action all of the property which has been in the hands of the receivers was transferred to this plaintiff and by order duly entered of record this plaintiff has been submitted as party plaintiff in this action.

That the original plaintiff was engaged in interstate commerce and on or about June 17, 1926, received a car of coal consigned to the defendant. The car was delivered to the defendant company on June 17, 1926 and released by it about 5 o'clock P. M. June 19, 1926.

The agent of the receivers presented a freight bill to the defendant company about three o'clock P. M. June 19, and a check for the amount of the freight in the sum of $375.96 was duly delivered to the agent accepted by him as payment therefor and the freight bill duly receipted as paid by said agent.

Said freight was received and paid for at the town of Kimball, S. D., and the check in payment of the freight charge was made against the account of the defendant company in the Lombard State Bank whose place of business was at that time in Kimball, S. D.

The check was not presented for payment at the Lombard State Bank on the date of its receipt or the succeeding day

as was the custom of the agent of the plaintiff company at that time, but under directions of the officers of the plaintiff company was sent to the Central Trust Company of Chicago for collection, and was not presented to the Lombard State Bank for payment until after that bank had closed its doors on June 25, 1926.

Both parties were aware of the fact that the Lombard State Bank was not in the best of financial circumstances at the time of the execution of the check, and same was sent to the Central Trust Company of Chicago for collection under the direction of the officers of the company as they were unwilling to trust a transfer of the payment of the account to a draft drawn on the Lombard State Bank.

The check has never been paid, and this action is brought and the claim made that the freight bill above referred to [fol. 13] has never been legally paid, as the agent of the plaintiff company and the company itself was without authority to receive anything but cash in the payment of freight bills.

It is plaintiff's claim that under an act of Congress entitled an Act to Regulate Commerce, passed on February 4, 1887, and amendments thereto, the company was without legal authority to accept the check in payment of the freight bill, and as the same was not paid in cash the bill has not been paid. And by reason thereof asks for judgment against the defendant for the amount of the freight bill yet due.

Defendant's claim is that the plaintiff, through its officers and agents were negligent in not presenting the check for payment, and that under the law merchant the freight bill has been paid and discharged.

The Interstate Commerce Commission adopted a rule dated September 15, 1906 known as Conference Ruling 207, reading as follows:

"207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of service, property, or other

payment in lieu of the amount of money specified in the published schedules."

The foregoing rule of the Interstate Commission has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. L. & N. Ry. Co. vs. U. S. 219 U. S. 486; N. Y. C. & H. R. R. Co. vs. Gray, 239 U. S. 583; Eggleston vs. Plowman (S. D.) 207 N. W. 981.

This decision and the following judgment is made without prejudice to the defendant to bring an action against the Plaintiff or its assignor for loss resulting from the failure to present the check for payment within a reasonable time, or any other negligence or negligent acts on the part of this plaintiff or its assignor.

It is therefore the Judgment and order of the Court that the plaintiff have and recover as against the defendant a [fol. 14] judgment in the sum of $375.96 with interest thereon at six per cent from June 25, 1926 and costs of this suit. To all of which plaintiff excepts.

Signed at St. Paul, Minn. this 20th day of November, A. D., 1928.

Chas. A. Dewey, Judge.

[File endorsement omitted.]

In United States District Court

Judgment—Filed Nov. 22, 1928

Now, Therefore, by reason of the Premises aforesaid, it is considered, ordered and adjudged that said Plaintiff, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, do have and recover of and from said defendant, Fullerton Lumber Company, a corporation, the sum of Four Hundred Thirty and 35/100 Dollars ($430.35) together with its costs and disbursements in this behalf expended, to be taxed, and that said plaintiff do have execution therefor.

Upon motion of counsel for the defendant it is

Further ordered that all further proceeding herein except the taxation of costs and the entry of judgment therefor be and they are hereby stayed for a period of forty two (42) days from and after this date to enable this defendant to move for a new trial and to prepare and present a bill of exceptions under the provisions of Rule XXI of this Court.

A true record. Attest:
Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy Clerk.

[File endorsement omitted.]

In United States District Court, District of Minnesota, Fourth Division

No. 2001. (Law)

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a Corporation, Plaintiff,

vs.

Fullreton Lumber Company, a Corporation, Defendant

Bill of Exceptions—Filed Feb. 23, 1929

Caption

This cause duly came on for trial in the District Court of Minnesota, Third Division, having been transferred by [fol. 15] Stipulation from the Fourth Division, before the Honorable Charles A. Dewey, United States District Judge, on the 13th day of November, 1928, without a jury, a jury having been waived by written stipulation.

Arthur C. Erdall, Esq., appeared as Attorney for Plaintiff and was present and conducted the trial on behalf of Plaintiff, and Stanley S. Gillam, Esq., appeared as Attorney for Defendant and was present and conducted the trial on behalf of Defendant.

Thereupon, the following proceedings were had, to-wit:

Appearances:

For the plaintiffs, Mr. A. C. Erdall.
For the defendant, Mr. Stanley S. Gillam.
Tried before Hon. Charles A. Dewey, Judge. Nell D. Needham, Reporter.

EVIDENCE ON BEHALF OF THE PLAINTIFF

FOREST T. GUSTAFSON, sworn by the Clerk, examined by Mr. Erdall, testified as follows:

Q. Your name is Forest T. Gustafson?
A. Yes sir.
Q. You are the agent of the Chicago, Milwaukee & St. Paul Railway Company at Kimball?
A. Yes sir.
Q. And you were agent of the receivers of that company in June, 1926?
A. Yes.
Q. How long prior to June 19, 1926, at Kimball?
A. The road was in the hands of the receivers when I went to work there, July 1, 1925.
Q. Now I will ask you whether or not you received a car load of coal consigned to the Fullerton Lumber Company in Northwestern car, No. 93360, about the middle of June, 1926?
A. Yes.
Q. Have you a record so you can show the date when that car arrived?
A. Yes.
Q. You have the original record here?
A. Yes.
Q. Will you refer to that original record? What is the record you are referring to?
A. Station demurrage record book.
[fol. 16] Q. Referring to that record, do you find the car number that I just mentioned?
A. Yes, sir.
Q. When did that car arrive at Kimball, S. D.?
A. At 2:50 p. m. June 16, 1926.

Q. Was the assignee notified that that car had arrived?

A. Our record shows: "Notified at 5:00 p. m. June 16."

Q. At five o'clock p. m. the same day?

A. Yes.

Q. What was done with the car with reference to its being placed for unloading?

A. It was not placed until 3:00 p. m. June 17, for the reason that we were unable to raise Fullerton Lumber Company to ascertain from them where car was to be spotted.

Q. In other words you could not get information from the Fullerton Lumber Company as to where they wanted the car spotted?

A. At that time.

Q. When was the car unloaded?

A. The record shows the car was released at 5:00 p. m. June 19.

The Court: What do you mean by "released"?

A. Well, that the car was emptied, as a rule, and in this case.

Q. When did you present a bill to them for freight to the Fullerton Lumber Company?

A. Some time during the afternoon of June 19. Probably between two and three o'clock p. m. I am not sure of the exact time.

Q. Now I show you Plaintiff's Exhibit A, and ask you what that is?

A. This is the freight bill covering this car of coal.

Q. That was the freight bill that you presented to them?

A. Yes.

Q. And on June 19, as shown, it was presented—it was presented you say, on June 19?

A. Yes, sir.

Q. Was that freight bill receipted or not?

A. Yes, sir.

Q. And in exchange for that freight bill what did you receive?

A. I received a check for $375.96.

Q. I show you Plaintiff's Exhibit B, and ask you what that is.

A. This is the delivery receipt covering this car of coal.

Q. This Exhibit B is a carbon copy of the Exhibit A?

A. Yes, sir.

Q. But on Exhibit B you have the endorsement "Fullerton Lumber Company, by Mr. Yarish" showing that he had received the car?

A. Yes.

Q. Now the $375.96, what did that cover?

[fol. 17] A. That covers the freight charges on that car. car.

Q. Moving from Norfolk, W. Va., to Kimball, S. D.?

A. Yes.

Plaintiffs offer in evidence Exhibits A and B. Admitted without objection.

The Court: When the check was given him he marked them paid and delivered them?

A. Yes.

Q. Now after you received the check from the Fullerton Lumber Company, what did you do with that?

A. I put it in my cash drawer.

Q. Where did you send it?

A. I remitted it to the Central Trust Company of Illinois at Chicago.

Q. Why did you send it to the Central Trust Company of Illinois at Chicago?

A. Because I was not sure of the condition of the Lombard State Bank, and I also had instructions, as I understood the instructions, to remit local checks along with currency, to remit direct to the Central Trust Company.

Q. Was the Central Trust Company of Illinois the depository in which you deposited your money?

A. Yes.

Q. Did you carry an account at the Lombard State Bank? Did you deposit your money and checks and leave them there so that you carried an account at any time?

A. I don't believe I understand your question.

Q. What I am getting at, prior to this particular period did you take checks and money to the Lombard State Bank and get a draft and deposit it in the Central Trust Company of Illinois at Chicago?

A. Yes.

Q. So that your depository was the Central Trust Company of Illinois at Chicago?

A. Yes.

Q. Whatever money you collected at that station you sent it in to the Central Trust Company of Illinois?

A. Yes.

Q. Did you make out deposit slips?

A. Yes, sir.

Q. Did you make out that deposit slip and send the money direct to that company in Chicago?

A. Yes.

Q. Had you always done that during your time as agent there, as to depositing the money collected?

A. Yes, sir.

Q. When you have—when did you send this check you have referred to? When did you send this check to the Central Trust Company of Illinois?

[fol. 18] A. I remitted it the morning of June 20th.

Q. That is the next morning?

A. Yes, the following morning.

Q. What train service did you have there at that time?

A. Our first east-bound passenger train was 10:35.

Q. You had one train a day east bound?

A. Yes.

Q. In order to send checks to Chicago, or express or mail to Chicago, it had to go out on the east-bound train?

A. Yes, sir.

Q. I show you plaintiffs' Exhibit C and ask you if that is the check that you refer to?

A. Yes.

Q. And that is the check that you sent to the Central Trust Company of Ill.?

A. Yes, sir.

Q. By what means did you send it there? By mail, or express, or how?

A. By express.

Q. And at that time what other funds did you send to the Central Trust Company of Illinois?

A. At that time there were several other checks.

Q. Will your cash book show that?

A. Yes, sir.

Q. Have you got it here?

A. Yes.

Q. Will your refer to that, please? State just what you sent in.

A. The Fullerton Lumber Company check $375.96, that was on the Lombard State Bank. Another check, O. G. Bradshaw's check for $124.16.

Q. That check was for freight charges, too, was it?

A. Yes, sir. Issued on the Lombard State Bank.

Q. What else did you send in?

Defendant objects as irrelevant.

Mr. Erdall: It is very short.

A. George Bray's check for $67.27. The balance was currency, $40.

Q. So that in addition to sending in these checks you sent $40 in current in your express package?

A. Yes.

Q. Previously, when you considered the bank in good condition, did you send currency to the Central Trust Company?

A. I exchanged station collections for drafts on the Lombard State Bank.

Q. You have the express receipt that shows your sending that money and checks on that day?

A. Yes.

Q. Have you referred to that and know that that is correct?

A. Yes, sir.

Plaintiffs offer in evidence Exhibit C.

Admitted without objection.

[fol. 19] Q. Mr. Gustafson, can you refer to your records and tell us what the correct amount of freight charges was on this particular shipment?

A. Yes, sir.

Q. What was it? Do you need any records to refresh your recollection?

A. Do you mean how I arrived at the amount?

Q. What the actual freight charges were and how you arrived at the amount.

A. Freight charges were based on 10,400 lbs lbs. R. O. M. coal. That is run of mine. At the rate of $7.23 per net ton.

Q. Then the freight bill of $375.96 is based on that charge?

A. Yes, sir.

Q. Do you know whether there was later a correction made on the [wright] of the coal?

A. Not as far as I recollect.

Q. As I understand it, the coal arrived there and the weight was given as shown on that freight bill?

A. Yes, sir.

Q. And the correct freight charges as shown under that freight bill were $375.96?

A. Yes, sir.

Q. And at that weight of coal, was that the correct freight charge?

A. Yes, sir.

Q. Have you ever received anything in payment of these freight charges in the way of money or cash in addition to this particular check that I have showed to you which is marked Plaintiff's Exhibit C?

A. No, sir.

Cross-examination.

By Mr. Gillam:

Q. This check for $375.96 you say that was sent by you to the Central Trust Company?

A. Yes sir.

Q. On Sunday morning?

A. Yes, I remitted it on Sunday morning.

Q. You will notice that on the back of that check there is an endorsement, "Pay to the order of the Central Trust Company of Illinois to the credit of the Receivers etc." Did you put that stamp on there?

A. No sir.

Q. You didn't put that stamped endorsement on there?

A. No sir.

Q. Your only endorsement was the written endorsement on there?

A. Yes sir.

Q. Then the stamped endorsement of the Receivers of the Milwaukee wasn't on there when you sent the check to the Trust Company?

[fol. 20] A. No sir.

Q. Do you know who put it on there?

A. No sir.

Q. Are you sure you sent that check to the Central Trust Company? Isn't it probable that you sent that to the home office of the company, the treasurer of the company, and that he endorsed that with that stamped endorsement?

A. No sir.

Q. You are sure you sent it to the Central Trust Company of Illinois at Chicago?

Q. For how long a time had you been sending local checks like that to Chicago?

Plaintiff objects as immaterial.

Objection overruled by the Court.

A. I would have to refer to my cash book. I am not sure.

Q. Had you sent any of the Fullerton Lumber Company checks to Chicago before the 19th of June?

A. I think not.

Q. This was the first one then that you sent in to Chicago, wasn't it?

A. Yes sir.

Q. You had been receiving checks from the Fullerton Lumber Company in payment of freight for quite a long time?

A. Yes, sir.

Q. Over a year?

A. Yes.

Q. Previous to this check on the 19th of June, what did you do with the checks of the Fullerton Lumber Company on the Lombard Bank?

A. I exchange them for a draft.

Q. You took them uptown to the bank?

A. Yes.

Q. And obtained a bank draft drawn on funds in Chicago or New York, I take it?

A. I don't know.

Q. A regular bank draft is what you got?

A. Yes.

Q. Didn't you deposit checks at the Kimball Bank at Kimball, S. D.?

A. Yes.

Q. You had an account there and you deposited checks there?

A. Yes.

Mr. Erdall: Are you sure you heard and understood that question, Mr. Gustafson?

[fol. 21] Q. Just to save time, while he is on cross-examination. I hand you Defendant's Exhibit 1, and ask you what that is.

A. Well, it is evidently a check for freight charges. Carload freight.

Q. Given to you by whom?

A. Mr. Yarosh.

Q. Given in payment of freight on a car or cars received by the Fullerton Lumber Company at your town of Kimball?

A. Well, I couldn't say unless I refer to my records.

Q. Will you look on the back of that check?

A. Yes sir.

Q. That check is endorsed by you?

A. Yes sir.

Q. When did you receive that check?

A. Well, I can't say unless I refer to my record.

Q. The check is dated isn't it?

A. As I read it, June 15, 1926.

Q. And was that check paid by the Lombard State Bank?

A. It is marked paid.

Q. What date?

A. June 15, 1926.

Q. That is the same day it is dated?

A. Yes.

Q. Now refer to your records if you don't recollect and tell us whether or not you received that check in payment for freight on or about the 15th day of June, 1926, and if you did how you handled that check in regard to its collection?

A. As near as I can tell from the notation I have there, I exchanged that for a Lombard State Bank draft—that check in with some other checks.

Q. You took that check, defendant's Exhibit 1, dated June 15, 1926, up to the Lombard State Bank the same day on which you received it, didn't you?

A. I have nothing to show but this check what this represents.

Mr. Erdall: Does your cash book show this particle item?

A. No sir.

Q. Well, it was for freight of some kind?

A. I presume so.

Q. Well, don't you know that? There is no question about that, is there?

A. I am quite positive it was.

Q. It couldn't be for anything else but freight, could it?

A. No.

[fol. 22] Mr. Gillam: In order to save time, I will have these 36 checks marked Defendant's Exhibit 2 (1 to 36 inclusive).

(Package of checks 1 to 36 inclusive is so marked by the Reporter).

Q. I show you now Defendant's Exhibit 2, 1 to 36 inclusive, which are checks, the first one of which is dated July 8, 1925, No. 548, and the last of which is dated May 25, 1926, No. 724, all of them purporting to be signed by J. H. Yarosh for the Fullerton Lumber Company, and payable to the Chicago, Milwaukee & St. Paul Railway Company, and ask you if all of these checks are endorsed by you?

A. Yes sir.

Q. Were any of these checks sent by you down to Chicago?

A. May I look at my cash record?

Q. Certainly.

(Witness leaves stand and examined record at table.)

A. No checks of the Fullerton Lumber Company on the Lombard State Bank were remitted to Chicago prior to June 19, 1926.

Q. That is, the check in controversy was the first one that you sent down to Chicago, wasn't it?

A. Yes sir.

Q. All of these other checks were presented by you the same day or the next day at Lombards were they not? I mean to their bank?

Question withdrawn.

Q. How did you handle these other checks, Mr. Gustafson?

A. Which other checks?

Q. The ones you hold in your hand, those 36 checks marked defendant's Exhibit 2?

Mr. Erdall: He wants the general way in which you handled them.

A. As a rule we exchanged them for bank drafts.

Q. And you did that the same day you got the checks did you not?

A. Well, I don't remember as to all these checks. I can't carry those in mind.

Q. How long did you keep these Fullerton checks in your cash drawer before you took them up to either the Kimball or the Lombard State Bank?

A. Possibly not over 24 hours, at the most.

[fol 23] Q. Are you familiar with the "paid" stamp of the Kimball State Bank?

A. Yes sir.

Q. Showing you check No. 548 for $220.30, one of the defendant's Exhibit 2, does that show the paid stamp of the Kimball State Bank on it?

A. Yes.

Q. What is the date of that?

A. July 9, 1925.

Q. When did you receive the check?

Mr. Erdall: We will concede that these checks were taken by him and that he obtained bank drafts to cover these checks and other funds and that the endorsement shown on them is the time when he received the draft, and the date of the check is substantially the time when he received them.

Mr. Gillam: And that the dates of the paid stamps by the two banks are substantially authentic?

Mr. Erdall: That is paid to the extent that they gave bank drafts for them.

Q. You said something about when you sent in this check dated June 19, 1926, that you were afraid of the condition of the bank there at Kimball. is that correct.

A. No, I was not sure of the condition of the bank, the Lombard State Bank.

Q. What was it, on which you based that?

A. Well, possibly on their statement, for one thing. Their statement that was given to me by the cashier.

Q. Had other banks closed in Kimball before this?

A. Yes sir.

Q. Were there other banks closing around you in various other towns?

A. Yes, I think they were.

Q. You knew about this, I take it?

A. I heard of several banks closing around there.

Q. That was before you sent this check into Chicago?

A. Yes, I believe so.

Q. When did the Lombard State Bank close?

A. About noon, June 25, 1926.

Q. That was the next Friday?

A. About noon, June 25, 1926.

Q. You say this check for $375.96, the one in controversy here, was given you by Mr. Yarosh between two and three o'clock on Saturday?

[fol. 24] A. I believe that is about the right time.

Q. Was it nearer two or nearer three o'clock?

A. I can't say exactly.

Q. Your train going west comes in there about three o'clock doesn't it?

A. Yes sir.

Q. And you, of course, have to be at the depot when the trains come in? And did at that time?

A. Yes.

Q. And for some little time previous to train time, in order to sell tickets?

A. Well, possibly

Q. You are usually there for an hour before the train arrives, are you not?

A. Yes sir, as a rule.

Q. So following your usual custom, it was about two o'clock that you got this check from Mr. Yarosh, wasn't it, rather than at train time?

A. I said I didn't know the exact time. I think it was around, between two and three o'clock.

Q. On Saturday, June 19, 1926, what time of day did the Lombard State Bank close for the day?

A. I don't know exactly.

Q. Don't you know what its banking hours were on Saturday?

A. I believe from 9:00 a. m. to 4:00 p. m.

Q. Four o'clock in the afternoon was the closing time?

A. Yes.

Q. How far was the Lombard State Bank from the Fullerton Lumber Company office?

A. Approximately two blocks and a half.

Q. Do you know how long it would take you to go from the Fullerton Lumber Company up there?

Mr. Erdall: Objected to as immaterial. I think it is self evident that it would take about two minutes.

Q. And was it about the same distance from the depot?

A. Just about.

Q. Defendant's Exhibit 3 is in your writing is it not?

A. Yes.

Q. That is a letter dated July 12, 1926?

A. Yes.

Q. And that was sent by you to whom?

A. It is addressed to the Fullerton Lumber Company, Minneapolis, Minn.

[fol. 25] Q. The second and third paragraph, or the body of the letter after the first paragraph refers to the matter in controversy, doesn't it?

A. Yes sir.

Defendant offers in evidence Defendant's Exhibit 1 and Defendant's Exhibit 2.

Admitted without objection.

Defendant offers in evidence Exhibit 3.

Admitted without objection.

Q. You have testified that you sent this check dated June 19, 1926, down to Chicago for two reasons. First, because you were afraid of the bank, of your local banks, and second, because of instructions which you received from Chicago. Is that right?

A. Because I was not sure of the condition of the Lombard State Bank, and from the instructions received, as I understood them, as to handling these local checks.

Q. What were those instructions?

A. I would have to refer to the letter to quote it exactly.

Q. Give your recollection of it.

Mr. Erdall: If you have the letter here you can refer to it, if you wish.

(Witness leaves stand to get letter.)

A. Is it necessary to read the entire letter?

Mr. Erdall: I think we better have the instructions themselves rather than his recollection of them.

(Letter is handed to Mr. Gillam.)

Defendant offers in evidence Defendant's Exhibit 4, being a letter of instructions dated June 16, 1926, from Mr. Loomis of Chicago.

Admitted without objection.

Q. And I understand your answer to the question is that you received that letter of instructions from Chicago?

A. Yes, sir.

Q. You had not sent in any of the Fullerton Lumber Company checks given you on the Lombard State Bank to Chicago prior to this one in controversy, had you?

A. No sir.

Q. That was the first one?

A. That was the first one.

[fol. 26] Q. Did you have an account at the Kimball State Bank?

A. Do you mean if I exchanged collections for bank drafts?

Q. No. Did you deposit money at the Kimball State Bank for the company?

Mr. Erdall: Did you have a book showing deposits? Did you have a regular account for the company, is what he means.

A. No.

Q. Why are so many of the checks in Exhibit 2 stamped with the stamp of the Kimball State Bank?

Plaintiffs object as irrelevant and immaterial.

The Court: Answer if you know. I don't know whether he would know about that.

A. I can't say without looking the checks up.

Q. You took them to the Kimball State Bank did you not?

A. Part of them.

Q. Why did you do that?

Mr. Erdall: I think it is immaterial. He says he had no account at either bank.

The Court: Is that the reason? Because you thought this bank was safer than the Lombard State Bank?

A. I don't remember what the circumstances were now, why we did that, without looking the matter up.

Q. Did the Chicago, Milwaukee & St. Paul Ry. Co. keep any money on deposit at either bank during all of the time you were there?

A. No. We just simply changed our collections for bank drafts.

The Court: Then sent the drafts in to the depositories as directed by the company?

A. Yes.

The Court: You don't mean that you had a depository there in Chicago, of your own, from your town?

A. No.

The Court: You sent that under the general directions of the railroad company as I understand, to the account of the railroad company?

A. Yes sir.

Redirect examination.

By Mr. Erdall:

Q. Both banks had had difficulties out there, had they not?

A. Yes.

[fol. 27] Q. The Kimball State Bank had had difficulty?

A. Yes.

Q. It had closed its doors something like a year before this time?

A. Yes.

Q. In your collections you had checks made on the Kimball State Bank and some times on the Lombard State Bank?

A. Yes.

Q. Some of the time you took all of your checks to the Kimball State Bank for drafts and sometimes to the Lombard State Bank for drafts?

A. Yes sir.

Q. At this particular time you considered the situation such that you didn't want to do business with either bank, is that it? At the time this check was presented to you on the 19th of June, 1926?

A. I don't know as I understand exactly what you mean.

Mr. Erdall: I will withdraw the question.

Witness excused.

JOHN DICKIE, sworn by the Clerk, examined by Mr. Erdall, testified as follows:

Q. What is your name?

A. John Dickie.

Q. What is your business?

A. Treasurer of the Chicago, Milwaukee & St. Paul Ry. Company.

Q. How long have you been treasurer of the company?

A. Since December, 1926.

Q. Prior to that time were you in the treasurer's office?

A. Yes sir.

Q. In June, 1926, what position did you hold?

A. I was assistant treasurer for the Receivers for the same company.

Q. At that time did the Receivers of the Chicago, Milwaukee & St. Paul Ry Co., have a bank depository in which they deposited funds?

A. Yes.

Q. What was that depository?

A. Central Trust Company of Illinois in Chicago.

Q. What was the method of handling funds that were collected and sent in by the agent to the Central Trust Company of Illinois, so far as the endorsement of the Chicago, Milwaukee & St. Paul Railway Company was concerned?

Or, I should say so far as the endorsement of the Receivers was concerned.

[fol. 28] A. They were furnished endorsement stamps. As a matter of identification. If the agents did not have the proper endorsement—on them.

Q. Now referring to Plaintiffs' Exhibit C, and calling your attention to the endorsement, "Pay to the order, etc., Receivers Chicago, Milwaukee, St. Paul Ry Co." Can you tell us where that was put on the check, as to whether it was put on by the bank?

A. It was put on there by the Central Trust Company of Illinois. This stamp marked "A" identifies this as the stamp the bank had. My stamp doesn't have the "A" representing the word "Agent".

Q. Did that check itself pass through your office prior to the time that payment was refused on it by the Lombard State Bank?

A. It did not.

Q. By referring to the check, will you tell us the manner in which that check was handled so far as the banks that it went through?

A. Well, it was endorsed over to the Federal Reserve bank, the date is, apparently, June 22, by the Central Trust Company of Illinois, and on June 23, was endorsed to any bank or banks by the Federal Reserve Bank of Minneapolis. They would send it out then to the Lombard State Bank for payment. Evidently when it arrived at Kimball the bank was closed on which it was drawn and it was returned to the Federal Reserve Bank and back to the Central Trust Company.

Q. Why was the check sent to the Federal Reserve Bank at Minneapolis?

A. Because Kimball, S. D., is in the Fourth Federal Reserve District.

Q. At least at that time, Kimball was in the district of the Federal Reserve Bank of which Minneapolis was the head?

A. Yes.

Q. Was it handled then in the usual way that checks are handled?

A. It was.

Q. I will ask you whether or not the Receivers, or their successors the Chicago, Milwaukee, St. Paul & Pacific Company have received anything for their freight except this check that you hold in your hand?

A. Not to my knowledge.

Q. That letter of instruction, Defendant's Exhibit 5, can you tell by whom that letter was written?

A. It was dictated by myself. It was signed by Loomis, treasurer for the Receivers.

Q. The initials on here, "J. D." are yours?

A. Yes sir.

Q. During the period involved here, and during the period a year prior to June 20, 1926, was it ever the custom [fol. 29] of the receivers of the C. M. & St. Paul Ry. Co., to deposit funds in any bank at Kimball, S. D.

A. It was not.

Q. And were the agents at Kimball, S. D., authorized to open an account at those banks?

A. They were not.

Cross-examination.

By Mr. Gillam:

Q. Did Mr. Gustafson have authority to send a local check on this Lombard Bank in to the Central Trust Company on the 19th day of June, 1926?

A. Yes.

Q. Had you instructed your other agents out there in South Dakota to send local checks on their local banks in to Chicago?

Mr. Erdall: Objected to as immaterial.

The Court: Objection overruled.

A. Where we had reason to believe that the banks were not in good shape we issued such instructions.

Q. Do you mean to interpret your letter of June 16, to Mr. Gustafson, as giving him authority to send local checks to Chicago?

A. Yes.

Q. Is that a very general practice?

A. It was at that time with reference to South Dakota banks, yes.

Q. Isn't it a fact that at that time your instructions all over South Dakota, with all those banks closing, that they were to send no local checks in, but were to get drafts on Chicago funds and to remit those drafts to Chicago?

A. No sir; those were not our instructions.

Q. You mean to say then, that Mr. Gustafson at Kimball, S. D., was instructed by your treasury department to take all local checks that he received at Kimball and send them in to Chicago?

A. He was to use his own discretion. To accept them from responsible corporations or individuals and otherwise to insist on currency for transportation charges.

Q. Of course you wanted checks from people who had funds?

A. Yes.

Q. But that hardly answers the question, does it? You mean to tell us that you, as the head of the treasury department there, or acting for it, instructed your South Dakota agents, at any rate in all places where the banks were shaky, to take local personal checks like this and send them clear into Chicago?

A. I did.

[fol. 30] Q. Have you had any other difficulties out there at other points in regard to closed banks?

A. Plenty of it.

Q. Would it not have been much wiser from the standpoint of the best interests of the railroad company to obviate the risk at once at each local station by there obtaining cash or a draft on a Chicago bank?

A. Well, the draft on the Chicago bank was no use to us if the bank that was issuing it was not in proper shape.

Q. How about the matter of currency?

A. The risk of shipping the currency was greater than the risk of these checks we considered.

Q. Of course in this case the risk of the Fullerton Lumber Company was very great, you can see that?

A. I can't see that, no. They were in just as good a position as we were or better. They had an account in the bank, we didn't.

Q. Your agent could have obtained the cash on that check the same day, could he not?

Plaintiffs object as argumentative.
Objection sustained.

The Court: You don't need to argue with the witness.

Q. At what other points than Kimball, before June 19, 1926, had you instructed your depot agents to send local checks into Chicago?

Mr. Erdall: Plaintiffs object as immaterial.
The Court: Objection overruled.

A. I can't answer that without my files. I haven't got them, but I have issued such instructions at other points.
Q. Very many?
A. Yes; I should judge we issued to 25 or 30 to 50. Maybe more, and subsequent to this, yes. Because western Iowa went bad after this time.
Q. Did you ever notify the Fullerton Lumber Company of that practice?
A. No.
Q. Did you ever notify any of your other shippers of that practice?
A. No sir.
Q. Isn't it a fact that you had issued instructions to your agents at Scotland, nearby, which was in about the same condition——
A. I really can't say without referring to the files.
Q. Have you any other letter or document besides this letter dated June 16, 1926, authorizing your agent at Kimball, S. D., to send a check in to Chicago?
[fol. 31] A. I don't think I have anything prior to that date.

Mr. Erdall: What took place afterwards would not be material.

Redirect examination.

By Mr. Erdall:

Q. You had had other experience of the same kind had you where checks had been handled in the way this check was handled that the bank closed and where the check was received on substantial shippers, who were good for the checks?

A. Yes.

Q. Did you collect the amounts of the checks?

A. We did.

Q. Did you have the same situation with O. G. Bradshaw who had a check on that particular day?

A. Yes.

Q. Has the bank received the money on that check?

A. I do not believe so.

Q. You are not familiar with the proceeding they had in South Dakota where they did collect on that check?

A. No; I am not.

Q. The Fullerton Lumber Company was considered as a good, responsible concern by the Railway Company?

A. Yes. We looked them up in our Dunn and Bradstreet reference books and found that they were a good concern.

Q. You knew that many of these shippers in that community did have accounts in the local banks?

A. No; I did not. That is something we don't know much about.

Q. Did you have any such information that you felt you could advise shippers that you didn't consider any particular bank, such as the Lombard State Bank, wasn't good pay, or wasn't in good shape?

A. No; that wouldn't be proper information for us to give out.

Q. Is there anything else you can think of in connection with this transaction that would be helpful, Mr. Dickie?

A. No; I think the ground is covered pretty fully.

Recross-examination.

By Mr. Gillam:

Q. You brought a file with you of that over charge, over payment claim?

A. Yes, I did.

Q. Without going into detail about it, your office did pay, gave a check for $4.00 and some cents to the Fullerton Lumber Company in payment of that claim, did it not?

[fol. 32] A. There is a draft issued by the auditor of freight accounts in payment of a claim. I got your wire just as I was leaving. I know nothing about it.

Q. That was the claim for over payment by the Fullerton Lumber Company on this particular shipment?

A. I believe so.

Q. And at the time your office paid that claim for over payment they had received no other payment than this check for $375.96 which is in controversy? That is the only payment?

A. This check had been issued in payment of the freight bill.

Q. And you had received no other payment from the Fullerton Lumber Company at the time your office paid back this four dollars and some cents for over payment? That is true, isn't it?

A. Yes.

Redirect examination.

By Mr. Erdall:

Q. That was issued by another department, was it not, Mr. Dickie?

A. Yes.

Q. After this check had been received and the freight bill receipted by Mr. Gustafson, the agent, where was that sent?

A. To our over-charge claims, by the Fullerton Lumber Company.

Q. There was some difference of opinion as to the weight of the shipment, as I understand it?

A. Just from looking at the papers this morning, yes.

Q. As you understand it the correct amount of freight was $375.96 minus this check for $4.26?

A. Yes sir.

Witness excused.

Mr. Gustafson recalled.

Examined by Mr. Erdall:

Q. In order that there be no misunderstanding, you say you sent this check in controversy by express. What express? What company?

A. American Railway Express.

Q. Yes, I understand that. Is that an express company that operates over pretty nearly every railroad in the United States?

A. Yes.
Q. It is not a Milwaukee Railroad property?
A. No sir.

[fol. 33] Witness excused.
Plaintiff rests.

EVIDENCE ON BEHALF OF THE DEFENDANT

J. E. YAROSH, sworn by the Clerk, examined by Mr. Gillam, testified as follows:

Q. You are the Fullerton Lumber Company agent at Kimball, S. D.?
A. Yes.
Q. You were their agent in June of 1926?
A. Yes.
Q. And have been their agent ever since?
A. Yes.
Q. For how long prior to that time were you their agent there?
A. Since they owned the yards.
Q. How long ago is that?
A. Since 1922.
Q. Showing you Plaintiffs' Exhibit C, being the check dated June 19, 1926, of the Fullerton Lumber Company, check No. 738, is that your name signed to that check?
A. Yes.
Q. When did you deliver that check to Mr. Gustafson?
A. On June 19, around two o'clock.
Q. Did he come there to the lumber yard?
A. Yes.
Q. And had the freight bill with him?
A. Yes.
Q. You gave him that check and he receipted the freight bill?
A. Yes sir.
Q. Showing you Plaintiffs' Exhibit A, I will ask you if that is the freight bill he had with him that afternoon?
A. It is.
Q. Did he receipt the freight bill and hand it to you?
A. Yes.

Q. And in return for that receipted bill you handed him the check Exhibit C?

A. I did.

Q. When did you first learn that that check had not been paid by the bank?

A. On June 29.

Q. What did you do when you received that notice?

Mr. Erdall: Plaintiffs object as incompetent, irrelevant and immaterial.

[fol. 34] The Court: Taken subject to the objection.

A. I went right down to the depot to see Mr. Gustafson.

Q. Did you have a conversation with Mr. Gustafson?

A. Yes.

Q. At the depot?

A. Yes.

Q. And on what date?

A. That was on June 29.

Q. What was that conversation?

Mr. Erdall: Objected to as incompetent, irrelevant and immaterial.

The Court: Taken subject to the objection.

A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes. And Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embar-ass the bank. I told him, why didn't he say something, I could have got him the cash from the bank.

Q. What else was said?

Mr. Erdall: Same objection.

A. That was all.

Q. At the time you gave that check on the 19th of June, 1926, did you have several hundred—Did you have sufficient funds in the Lombard State Bank with which to pay the check?

A. Yes sir.

Q. Did you continuously have sufficient funds there up until the day that the bank closed?

A. Yes sir.

Q. Now Mr. Yarosh, referring to the Defendant's Exhibit 1, the check of the Fullerton Lumber Company dated June 15, 1926. Is your name signed to that?

A. Yes.

Q. To whom did you deliver that check?

A. To the agent, Mr. Gustafson.

Q. In payment for what?

A. This covered two cars of coal.

Q. Handing you Defendant's Exhibit 2, which comprises 36 checks, dated from July 8, 1925 to May 25, 1926. I will ask you if your name is signed to these checks?

A. Yes sir.

Q. These checks were all given to Mr. Gustafson in payment of freight?

A. I think they were, yes.

[fol. 35] Q. They were all made payable to the Chicago, Milwaukee, & St. Paul Railway Company and given to Mr. Gustafson?

A. Yes.

Q. That is true of all the checks we have here this morning?

A. Yes sir.

Q. These checks are all made on the same form?

A. Yes.

Q. And handed in the same way to Mr. Gustafson in return for receipted freight bills?

A. Yes.

Q. You are acquainted with the paid stamps of the two banks at Kimball?

A. Yes sir.

Q. You know that these paid stamps are the authentic paid stamps of each bank on every one of these, which ever bank it is?

A. Yes.

Q. And you received all these checks back in due course from the Lombard State Bank with your statement I take it?

A. Yes.

Q. Did you ever have any notice before the 29th of June from Mr. Gustafson that he was sending your checks to Chicago?

A. No, sir.

Q. What was his practice in handling the checks so far as you knew it?

A. To cash them the same day or the next day there in town.

Q. At Kimball, S. D.?

A. Yes.

Q. I suppose you obtained that knowledge from your paid checks?

A. Yes, sir.

Q. You had been paying these freight bills by check for at least a year, I take it, according to the date on these checks in Exhibit 2, going back to July of 1925?

A. Yes.

Q. Had you ever had any difficulty before with regard to the collection of these checks with Mr. Gustafson?

A. No, sir.

Q. They had all gone through in the regular way?

A. Yes.

Q. And you had always paid them by check?

A. Yes.

Q. Did he ever ask you to give him currency?

A. No, sir.

Cross-examination.

By Mr. Erdall:

Q. The Fullerton Lumber Company had an account, through you, as agent, with the Lombard State Bank?

A. Yes.

Q. You got statements from the bank as to what cash they had on hand, etc.?

A. Yes, sir.

[fol. 36] Q. So you were familiar with the conditions as they existed at that bank?

A. In a general way.

Q. Did you cash any checks at the Lombard State Bank after June 19, 1926 and up to June 25?

A. Yes, sir.

Q. Have you a record as to what those checks were?

A. Yes, sir.

Q. Have you that with you?

A. I think Mr. Gillam has it.

Q. What checks did you cash at the Lombard State Bank after June 19, or from June 19, to June 25, 1926?

A. I could not say without looking up my record.

Q. You will be here this afternoon?

A. Yes, sir.

Q. Will you look that up during the noon hour?

A. Yes, sir.

It is conceded by the parties that the check in controversy went to Chicago on the first passenger train going east after the check was received by the agent of the railroad company.

Noon Recess.

Cross-examination of Mr. Yarosh by Mr. Erdall resumed:

Q. Did you check up during the noon hour to see what checks were actually cashed on the Lombard State Bank from June 19 to 25, inclusive?

A. Yes, sir.

Q. What checks did you cash?

A. Cashed one for $50 on the 23rd day of June, and on the 24th one for $20.55, and another one for $300 on June 24th.

Q. Do you have your record here showing those items?

A. Yes, I just took it off of the report there.

Q. Could I see it?

(Mr. Gilliam shows Mr. Erdall record.)

Q. These three checks you refer to, they were all checks that were cashed for the Fullerton Lumber Company?

A. They were drawn on its account at the bank.

Q. Are you in any way connected, or were you connected with the Lombard State Bank? Were you a stockholder or anything of that character?

A. No, sir.

Q. Now on that $300 item, you exchanged that for a draft on the bank?

A. Yes, sir.

Q. Did you actually get the cash on that?

A. I bought a draft with it.

Q. Was the draft cashed? You got a draft from the Lombard State Bank for $300, did you receive the $300 on the draft, or not?

[fol. 37] A. I think that draft got caught. I don't think that draft got through.

Q. You think that draft did not go through before the bank closed?

A. No.

Q. So far as the checks which you actually received cash on, there was one for $50 on June 23, and one for $20.55 on June 24?

A. I think that is correct.

Redirect examination.

By Mr. Gillam:

Q. This $300 check here between the 21st and the 23rd of June, 1926, you don't know whether that $300 draft went through or not, do you?

A. It may have. I don't think it went through. That is my recollection. I am not sure about that.

Q. Did you make a deposit in the Lombard State Bank after June 19?

A. Yes, sir.

Q. About when was that deposit made?

A. I made a deposit on about the 23rd.

Q. For how much?

A. Right around $300. Right close to $300. $286.88.

Q. You deposited that in the Lombard State Bank on the 23rd of June?

A. Yes, sir.

Q. Now these checks that you have testified about were ordinary checks made in the due course of business, were they?

A. Yes, sir.

Q. They were payable to different persons?

A. Yes.

Q. None of them were payable to the Fullerton Lumber Company?

A. No.

Q. They were in payment of various items for which the Fullerton Lumber Company was indebted at Lombard?

A. Yes, sir.

Q. Were you a depositor in the Lombard State Bank?

A. A little bit, yes.

Q. About how much did you have on deposit there when it closed?

A. This check that I got caught with and about $100 or $150 more.

Q. You filed your claim for your deposit against the Receiver of the bank?

Mr. Erdall: Objected to the question as immaterial.

The Court: Taken subject to the objection.

Q. Have you ever been paid anything on account of your claim against the Lombard State Bank?

A. No.

[fol. 38] Q. Has the Lombard State Bank ever paid any dividends of any kind since it closed?

A. No, sir.

Q. You are familiar with the banking situation there?

A. Yes, sir.

Q. Are you on the committee of one of the other closed banks?

A. I am.

Q. What kind of a committee is that?

Mr. Erdall: Objected to as immaterial.

A. Depositors' committee.

Q. Of what bank?

A. The Commercial Bank.

Q. That bank previously closed at Kimball?

A. Yes.

Q. Has that bank paid any dividends?

Mr. Erdall: Same objection.

The Court: Taken subject to the objection.

A. No, sir.

Q. Have you checked up as to whether the Lombard is likely to pay any dividends?

Mr. Erdall: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid.

The Court: Taken subject to the objection.

A. I have somewhat.

Q. With whom have you checked up on it?

A. With the examiner in charge.

Q. You have done that in your capacity as a depositor of the Lombard State Bank?

A. Yes.

Q. What are the possibilities of a dividend there?

Mr. Erdall: Objected to as incompetent, irrelevant and immaterial and calling for testimony based on hearsay.

The Court: Taken subject to the objection, if counsel insists.

A. The best information I could get on that, it will probably be somewhere between 10 and 12 per cent.

Q. But there has been no dividend paid of any kind since it closed?

A. No.

Q. Have you, as a depositor of the bank, received any notice as to when a dividend will be paid?

A. No.

Q. So far as you know as a depositor there is no present likelihood of a dividend, so far as any notice having been given to you, as a depositor, is concerned?

A. No, sir.

[fol. 39] Q. Did you file a claim on behalf of the Fullerton Lumber Company?

A. Yes.

Q. Has anything been paid on that claim?

A. No, sir.

Q. What is the amount of the Fullerton Lumber Company claim?

A. I couldn't tell you offhand. We took our balance in the bank less this check drawn in favor of the railroad company.

Q. And you filed a claim for that?

A. Yes.

Q. Did that claim include this $300 that you drew out to buy a draft with?

A. Yes, sir, I think it did. At the time we filed the claims it is my recollection we filed it for that, too.

Q. Did you have any knowledge up to the day it closed of a likelihood that this bank would close?

A. I didn't.

Q. You did business with it on the same basis that you had always done?

A. Yes.

Q. You made this deposit of $286.88 and drew checks in the usual course of business? That is a fact, is it?

A. Yes, sir.

Q. On the 19th day of June, 1926, did Mr. Gustafson say anything to you about currency in payment of the freight bill? Did he ask you for currency?

A. No, sir.

Q. Did he at any previous time?

A. No sir.

Q. Nothing was ever said by him about currency?

A. No, sir.

Q. He never demanded cash, or currency, from you in payment of freight bills?

A. No, sir.

Cross-examination.

By Mr. Erdall:

Q. When you presented your claim to the Lombard State Bank, you say you took the total amount of your deposit with the bank on the day it closed and deducted $375.96 from that amount and then made claim for the balance?

A. We left out the amount of this check to the railroad company.

Q. You took the total amount of the deposit you had in the bank on June 25, deducted the amount of this check from that and made a claim for the balance? Is that right?

A. Yes.

Redirect examination.

By Mr. Gillam:

Q. This $375.96 was deducted at the time the check was given, wasn't it?

[fol. 40] A. Of course our account would show that much less whenever we drew a check to the railroad company for freight. Our bank balance was reduced that much.

Q. At the time the check was drawn?

A. Yes, we just made our claim.

Recross-examination.

By Mr. Erdall:

Q. You made a claim for what was shown on your check balance after these various checks outstanding had been deducted, and you made a claim for that amount?

A. Yes.

Witness excused.

Mr. Gustafson is here recalled for further Direct Examination by Mr. Erdall:

Q. I show you Plaintiffs' Exhibit D and you may state what that is.

A. It is remittance slip covering itemized statement of checks and currency remitted to the Central Trust Company of Illinois.

Q. Is that the deposit slip that you referred to previously in your testimony?

A. Yes sir.

Q. That is the slip that you say you sent with these checks and the currency to the Central Trust Company of Illinois?

A. Yes.

Mr. Erdall: Plaintiffs offer in evidence Plaintiffs' Exhibit D.

Admitted without objection.

Q. Now after the bank had closed, did you tell Mr. Yarosh why you sent the checks to Chicago?

A. As I remember, I told him we had instructions to remit direct.

Q. Did you send those checks to Chicago because you were afraid of embar-assing the bank?

A. No. That question had not come into my mind at the time.

Q. As I understand it, you sent these checks to Chicago because you thought by so doing you were protecting the interests of your employers. That is the reason why you are doing it?

A. Yes.

[fol. 41] Cross-examination.

By Mr. Gillam:

Q. You do admit that you had this conversation with Mr. Yarosh on the 29th day of June, 1926?

Mr. Erdall: Object to that on the ground the witness is entitled to know just the conversation *is* referred to.

Q. You heard the testimony of Mr. Yarosh that he went over to see you on the 29th day of June?

A. Yes sir.

Q. Did he or did he not do that?

A. I do not remember the date, but I remember of him coming there.

Q. What did he say to you when he came over there?

A. I believe as near as I remember it was just as he stated in his testimony.

Q. His testimony was correct then?

A. Yes.

Q. Then his testimony was correct as to what you said, wasn't it?

A. I do not remember of making that statement that it would embar-ass the bank.

Q. You don't remember of telling him on that occasion anything about why you sent the check to Chicago?

A. As I remember, I told him I had instructions to remit the checks.

Q. Are you sure that is what you said at that time?

A. I am quite sure.

Q. Are you sure you didn't say something about embarrassing the Lombard State Bank? Will you swear, under oath, that you did not say it, Mr. Gustafson?

Mr. Erdall: That question is objected to as incompetent and improper.

The Court: Sustained.

Q. Are you sure you didn't say that to Mr. Yarosh?

A. I have no recollection of saying anything of the kind at that time.

Q. You have testified that you sent these checks and money to Chicago on the Sunday morning train on the 20th day of June, 1926?

A. Yes sir.

Q. That the remittance went forward on that train?

A. Yes.

Q. Going forward on that train when would it arrive in Chicago, in due course?

[fol. 42] A. I believe at eight o'clock the following morning.

Q. That would be Monday morning, June 21st?

A. Yes sir.

Q. I show you Plaintiffs' Exhibit C, being the check in controversy, the check for $375.96, it is hard to tell from these endorsements, but you will notice on the back there that the endorsement of the Central Trust Company of Illinois [id] dated June 22. Do you see that "22" right there?

A. I can't be certain about that.

Q. Do you say that check was put on the train so it arrived at the Central Trust Company of Illinois in Chicago on the morning of Monday, the 21st day of June?

A. I believe it should arrive at that time.

Q. So far as you know the train arrived there on time?

A. Yes, so far as I know.

Q. At any time did you ask Mr. Yarosh for cash or currency in payment of freight costs?

A. No sir.

Q. Did you ask him on Saturady, June 19th, for currency or draft?

A. No sir.

Q. You took the check as you had taken them before?

A. Yes sir.

Q. Just as you had been taking them for more than a year before.

A. Yes.

Q. And you gave him a receipt on his freight bill in return for that check? The receipted bill?

A. Yes sir.

Q. You still reside at Kimball, S. D.?

A. Yes sir.

Q. Have you a deposit in the Lombard bank?

A. No sir.

Q. Do you know whether the Lombard State Bank has paid any dividends?

A. Not to my knowledge.

Q. You don't know of anything that it has paid?

A. No sir.

Redirect examination.

By Mr. Erdall:

Q. As I understand it, you delivered this check and the other checks, to the American Railway Express Company on Sunday morning, June 20?

A. Yes sir.

Q. What they did with it after that time you don't know?

A. No.

[fol. 43] Q. That is, what the American Railway Express Company people did with it, you don't know?

A. No.

Q. As I understand it, you addressed it to the Central Trust Company of Illinois before you delivered it to the express company, at Chicago, Ill. That is, this package, you addressed it to the Central Trust Company of Ill., at Chicago?

A. Yes.

Q. I presume you don't know how many deliveries the Express Company has at Chicago, or had?

A. No.

Q. And you don't know what time the train actually arrived in Chicago?

A. No.

Q. Nor what the manner of doing business of the Express Company in Chicago is, or was?

A. No.

Q. Did you ordinarily send your remittances to the Central Trust Company of Illinois at Chicago, Illinois, by the American Railway Express?

A. Yes.

Recross-examination.

By Mr. Gillam:

Q. Who is the agent of the Express Company there at Kimball, S. D.?

A. I am.

Q. Are you paid a salary?

A. No sir.

Q. What compensation do you receive as their agent?

A. I receive ten per cent commission on the charges.

Q. On the gross business in money?

A. Yes.

Q. What express charges did you pay on this shipment on the morning of the 20th of June?

A. I didn't pay any.

Q. Was that carried free by the Express Company?

A. We bill it on a non-revenue bill. That is handled by contract as far as I know.

Q. On a non-revenue basis?

A. I presume so.

Q. So as far as you know, it didn't cost you anything to ship currency or checks or anything like that into Chicago? As far as you know?

A. No sir.

Q. Did it cost you anything to go up to the bank and get currency on checks?

A. No sir.

Q. There was no fee to be paid for that?

A. Not to my knowledge. At least I haven't paid any.

Q. Did you have to pay anything for drafts when you got drafts?

A. No sir.

Q. That didn't cost you anything?

A. No sir.

[fol. 44] Q. You say then that the reason why you sent this check of June 19, and hadn't ever sent a check of the Fullerton Lumber Company to Chicago before, was on account of the embarrassment of the bank, and on account of what you understood the instructions to be?

Mr. Erdall: Plaintiffs object to the question as misquoting the statement of the witness.

The Court: I think we have gone far enough. We have gone over that.

Witness excused.

Mr. DICKEY recalled for further examination.

By Mr. Erdall:

Q. This deposit slip Plaintiff's Exhibit D, have you seen that before?

A. Yes.

Q. From what source did you receive that?

A. From the Central Trust Company of Illinois.

Q. Do you receive statements from them showing deposits made by agents?

A. Yes.

Q. Have you a statement with you covering this particular time?

A. Yes sir.

Q. I show you Plaintiffs' Exhibit E. State what that is.

A. Statement rendered by the Central Trust Company of Illinois of the amount credited to our account from the agents of the Railway Company on June 22, 1926.

Q. Does that statement show an item of $607.39 received from the agent at Kimball, S. D.?

A. It does.

Q. Have you designated that particular item?

A. I have, by putting a red ring around it.

Q. All of these amounts, these remittances, that are shown on this statement were made direct by the agents from the points shown to the Central Trust Company of Illinois?

A. Yes.

Q. In other words the Central Trust Company of Illinois is a depository for all of the checks shown on that statement? All of the remittances?

A. Yes sir.

Plaintiffs offer in evidence Exhibit E.

Admitted without objection.

Cross-examination.

By Mr. Gillam:

Q. Did this train that left Kimball, S. D. at 10:35 Sunday morning arrive in Chicago at eight o'clock a. m. the next morning?

A. I do not know.

[fol. 45] Q. Have you personally taken up with the Fullerton Lumber Company the matter of paying this check?

A. No; I don't believe so. It was done through some one else. We first asked Mr. Gustafson to request their manager to pay it. When they declined to pay it our traffic manager up here asked them.

Mr. Erdall: They have been asked several times to pay the outstanding freight charges covered by this check?

A. Yes sir.

Mr. Gillam: Has the check been returned to the Fullerton Lumber Company?

A. No.

Q. It has not been returned?

A. It would not be returned until—unless it was paid.

Mr. Erdall: Of course we tender them the check at this time if they will pay it.

Evidence closed.

Reporter's certificate to foregoing omitted in printing.

ORDER FOR JUDGMENT

After hearing all the evidence, and the argument of Counsel, the Court took the matter under advisement and on November 20th, 1928, made its Decision and Order for Judgment in favor of Plaintiff in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars, with interest thereon at six per cent per annum from June 25th, 1926, together with the costs of this suit, to all of which Defendant excepted.

[fol. 46] Thereafter, Defendant duly made and filed its motion for amended findings and a new trial and thereupon

the said motion for new trial duly came on to be heard before this Court, at Des Moines, Iowa, on the 2nd day of February, 1929.

Defendant's motion for amended findings and for a new trial on the following grounds as follows:

NOTICE OF MOTION FOR AMENDED FINDINGS AND FOR NEW TRIAL

To the plaintiff above named and to Messrs. F. W. Root, C. O. Newcomb, and A. C. Erdall, its attorneys:

You are hereby notified that at a term of the above named Court, to be held at the Court House in the Federal Building in the City of Minneapolis, Hennepin County, Minnesota, on Monday, January 14th, 1929, at 10 o'clock A. M. of said day or as soon thereafter as Counsel can be heard, the above named Defendant will move the Court, for an Order striking out and cancelling the first three lines of the Seventh Paragraph of the Findings of Fact and Conclusions of Law, duly signed by Charles A. Dewey, Judge, and dated November 20, 1928, and finding in lieu thereof that Defendant was not aware that the Lombard State Bank was not in the best of financial circumstances at the time of the execution of the check.

And Defendants will further move said Court for its Order further amending said Findings of Fact and Conclusions of Law so as to find that said bill for freight involved in said action was duly and legally paid, and that Defendant is under no liability to Plaintiff, and that Defendant is entitled to judgment and for costs and disbursements.

And you are further notified that, in case said Court shall deny said Amendments to the Findings of Fact and Conclusions of Law that then and in that event that Defendant will move said Court for a new trial of said action, and for grounds of said new trial Defendant assigns error as follows:

That the Findings, Judgment, Decision and Order of the Court are not justified by the evidence, and are contrary to law, and that the Findings, Judgment, Decision and Order should have been in favor of the Defendant in said above entitled action.

And you are hereby further notified that, in case said Court shall deny said Amendments of its Findings and [fol. 47] Decision and shall deny said new trial, that then and in that event Defendant will move said Court for its Order, granting Defendant the right to amend its Answer so as to include therein a counterclaim for damages for Plaintiff's negligence in not properly dealing with or presenting for payment the check involved in said action at law, and for stay of execution of the judgment herein to and until such time as said issue of law upon said counterclaim may be properly tried and determined and that, if the decision on such counterclaim shall be in Defendant's favor, then that the amount of judgment thereon shall be set off against the amount allowed in the Findings of Facts and Conclusions of Law heretofore filed herein, and that Plaintiff shall pay to Defendant the balance thereof, if any, found to be due.

And Defendant will ask such other and further Order and relief as may be just in the premises.

Dated January 5th, 1929.

Stanley S. Gillam, Attorney for Defendant, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota.

After consideration of said motion, the Court overruled the same and made its Order as follows:

ORDER SUSTAINING MOTION FOR AMENDED FINDINGS IN CERTAIN RESPECTS AND OVERRULING MOTION FOR NEW TRIAL

The motion of Defendant for amended findings and for new trial of the above entitled action duly came on to be heard before the undersigned, a Judge of the United States District Court, and the Judge who tried the said case, at the Federal Court House in the City of Des Moines, Iowa, at 10:00 o'clock A. M. on Saturday, February 2nd, 1929.

Stanley S. Gillam duly appeared on behalf of Defendant in support of said motion and there was no appearance upon behalf of Plaintiff at said hearing.

The Court, being duly advised in the premises, having read said motion papers and having heard the argument of Counsel,

It is hereby ordered:

(1) That said motion for amended findings, insofar as said motion refers to Paragraph Seven (7) of the findings, decision, judgment and order of this Court, dated Novem- [fol. 48] ber 20th, 1928, and heretofore filed herein, be, and it hereby is, granted, and Paragraph Seven (7) of said decision and findings, dated November 20th, 1928, be, and it hereby is, amended and changed so as to read as follows, in lieu of said Paragraph Seven (7) as originally written:

"The plaintiff was aware of the fact that the Lombard State Bank was not in the best of financial circumstances at the time of the execution of the check, and same was sent to the Central Trust Company of Chicago for collection under the direction of the officers of the company as they were unwilling to trust a transfer of the payment of the account to a draft drawn on the Lombard State Bank."

(2) In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied, and the Court adheres to its views as set forth in said findings and decision dated November 20th, 1928, that said freight bill was not legally paid by said check therein referred to.

(3) Said motion for a new trial of said action is denied.
Dated February 2nd, 1929.
(Sgd.) Chas. A. Dewey, Judge of U. S. District Court.

PRAYER OF DEFENDANT FOR APPROVAL OF BILL OF EXCEPTIONS

Thereupon Defendants tenders this its Bill of Exceptions to the action of the Court in the various particulars therein set out.

Dated this 20th day of February, A. D. 1929.
Stanley S. Gillam, Attorney for Defendant.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

Thereafter and on the 23rd day of February, 1929, and within proper time, the Defendant duly tendered this, its

Bill of Exceptions herein, which having been seen and examined by the Court and Counsel, is by the Court allowed and approved, and the said Bill of Exceptions is signed and sealed by the Honorable Charles A. Dewey, Judge of the [fols. 49 & 50] United States District Court, before whom said proceedings were had, and the same is ordered by said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge of said Court before whom said proceedings were had this 23rd day of February, 1929.

Chas. A. Dewey, Judge of United States District Court for the District of Iowa.

The above and foregoing Bill of Exceptions is hereby approved.

F. W. Root, C. O. Newcomb & A. C. Erdall, Attorneys for Plaintiff. Stanley S. Gillam, Attorney for Defendant.

Let the Bill be filed and the filing shown of record as of this 23rd day of February, 1929.

Chas. A. Dewey, Judge.

[File endorsement omitted.]

(Here follow Plaintiff's Exhibits A, B, C, and D, side folios 51 & 52, 53 & 54, 55 & 56, and 57 & 58)

[fol. 59] PLAINTIFF'S EXHIBIT E

N D N

(This exhibit is a large Journal sheet, for June 22, 1926, of the Central Trust Company of Illinois listing deposits from various stations. The relevant portion of this deposit sheet is as follows)

A-5-25-500M

Pd off of a NOW

Car # 93360

6196

Form 72-T. W.

MAKE CHECKS PAYABLE TO
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

8629

FREIGHT BILL

KIMBALL, S. D. STATION 6-16-6 192

CONSIGNEE Fullerton Lbr Co

FREIGHT BILL NO. 374

DESTINATION

ROUTE NW-Coals. Pt-Chgo. Cons't

(POINT OF ORIGIN TO DESTINATION)

To CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Dr., For Charges on Articles Transported:
H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

3553

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
North Fork W.Va.	6-9-1937	Coal by Curran +13	NW 93360
POINT AND DATE OF SHIPMENT	CONNECTING LINE REFERENCE	PREVIOUS WAYBILL REFERENCES	ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Rom Coal	104000	7.3	37.96	✓	
Light at Ports Ohio 1432 410 102200 ✓					
RW Mitchell 1450 410 1040					
★TOTAL PREPAID $					

CLAIM
No 150216
C.M. ST. P. R'Y CO.

LOCATION		
WAREHOUSE	POST OR SECTION	

RECEIVED PAYMENT 6/19 192 6

40

F. Thompson AGENT

PER CASHIER OR COLLECTOR

TOTAL 37.96

★FOR USE AT JUNCTION POINTS ON FREIGHT SUBJECT TO CONNECTING LINE SETTLEMENT.

THE ORIGINAL PAID FREIGHT BILLS MUST BE SURRENDERED FOR OVER-CHARGES TO BE REFUNDED, AND MUST ACCOMPANY CLAIMS FOR OVER-CHARGE, LOSS OR DAMAGE.

51-52

Pl Ex B 1937

Form 72-T W.

DELIVERY RECEIPT

CONSIGNEE Fullerton Lbr Co

DESTINATION

ROUTE NTW - Cals - Plt - Chgo. Cust

(POINT OF ORIGIN TO DESTINATION)

STATION 6/16 1926

FREIGHT BILL NO. 374

Received of CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, The following Described Articles in Good Order:

H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
Northfork Wkg.	6-9-1937	Coates Clarke Co.	NTW. 9336
POINT AND DATE OF SHIPMENT	CONNECTING LINE REFERENCE	PREVIOUS WAYBILL REFERENCES	ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Rom Coal	104000	7.23	375.96		
Light at Ports Okee 1432 410 104000					
RW Mitchell 111500 410 1640					
	TOTAL PREPAID $				

LOCATION

WAREHOUSE	POST OR SECTION

DELIVERED BY

DELIVERY CLERK

NOTICE MAILED ____ 192__

DATE OF DELIVERY 6/16 192__

RECEIPT OF PROPERTY ACKNOWLEDGED

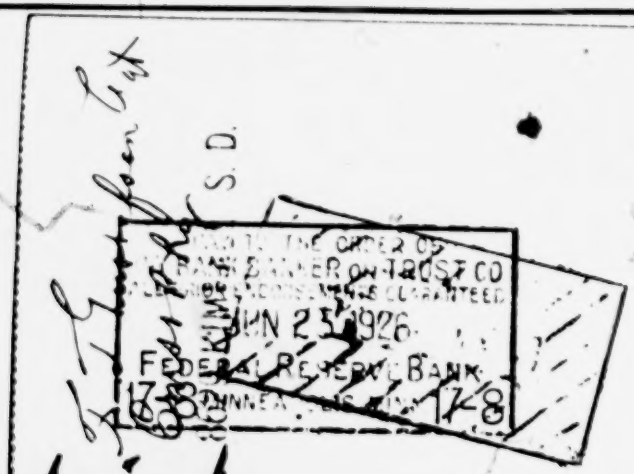
Fullerton Lbr Co. CONSIGNEE

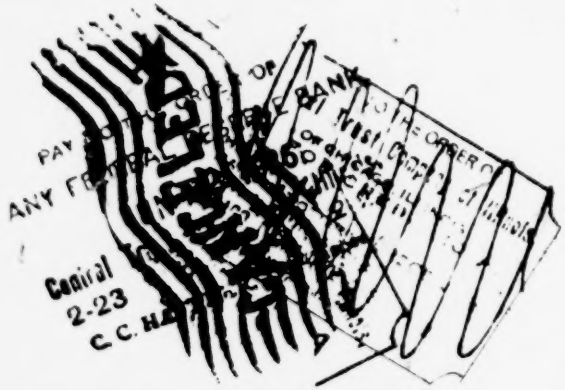
PER J E Brown

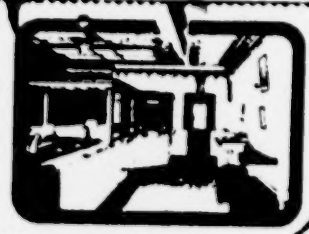
TOTAL 375.96

TO BE RETAINED FOR STATION RECORD WHEN DATED AND SIGNED BY CONSIGNEE.

53=54







PH LC

FULLERTON LUMBER COMPANY
WHOLESALE AND RETAIL LUMBER

No. 738

KIMBALL, SOUTH DAKOTA, 6/19, 1924

PAY TO THE ORDER OF C. M. & St. P. Ry. Co. $375.96

Three Hundred Seventy Five & 96/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF MINNEAPOLIS

TO THE HOLBARD STATE BANK
KIMBALL, SOUTH DAKOTA
78-196

FULLERTON LUMBER COMPANY
By J. E. Yarosh

55-56

57=58

O-4-36 10M Form 129

For Credit In June Account
MONTH

SEE RULES 614 AND 617

To be used in remitting Currency, Coin, Bank Checks, Money Orders, Pay Checks and Drafts on connecting lines.

Chicago, Milwaukee & St. Paul Railway

H. E. Byram, M. W. Potter and E. J. Brundage, Rec.
TO PUGET SOUND—ELECTRIFIED

Midwest DIVISION.

8629 KIMBALL, S. D. Station.

June 19 1926

CENTRAL TRUST CO., of ILLINOIS, Chicago

I hand you herewith the following items for credit to Chicago, Milwaukee & St. Paul Railway
H. E. Byram, M. W. Potter and E. J. Brundage, Rec.

D J Gustafson Agent

Currency, $	40	00
Gold, $		
Silver, $		
Checks, etc. (itemize) $		
Fullerton Lbr Co #7381	375	96
O J Brandel	124	16
Geo Bragg	67	27
Total, $	607	39

Agents must also show hereon:

Date of last remittance 6/18

Am't of " " $61 00

Treas. 1021

Central Trust Company of Illinois

The account of the Chicago, Milwaukee & St. Paul Railway Co. with this bank is credited being amount received today from agents as detailed below:

Chicago, Ill., June 22, 1926.

(Here folows tabulated list of a large number of stations on a Journal sheet, among which is the following:)

Station	Amount
8629 Kimball,	$607.39

Defendant's Exhibit 1

NDN No. 737

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

June 15, 1926.

Pay to the order of C., M. & St. P. Ry Co. $502.70 five hundred two & 70 100 dollars.

Collectible at par through the Federal Reserve Bank of Mpls.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid the Lumbard State Bank, Kimball, S. Dak., June 15, 1926.

Endorsed: F. T. Gustafson, Agt. C. M. & S. P. Ry.

[fol. 60] Defendant's Exhibit 2 (1 to 36 Inclusive) NDN

2-1 No. 548

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

July 11th, 1925.

Pay to the order of C., M. & St. P. Ry Co. $147.15 One Hundred Forty Seven and 15/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid the Lumbard State Bank, Kimball, S. Dak., July 13, 1925.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.

2-2.—No. 548

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

July 8th, 1925.

Pay to the Order of C., M. & St. P. Ry. Co. $220.30 Two Hundred Twenty & 30/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak., July 10, 1925.

Endorsed: F. T. Gustafson, Agt., C., M. & St. P. Ry.

Endorsed: Kimball State Bank, July 9, 1925.

[fol. 61] 2-3. No. 552

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

July 17th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $486.94 Four Hundred Eighty Six & 94/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, So. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. July 20, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Jul. 18, 1925.

2-4. No. 564

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 6th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $164.31 One Hundred Sixty-four & 31/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 7, 1925.
Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Aug. 6, 1925.

[fol. 62] 2-5. No.566

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 7th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $2.07 Two & 07/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 8, 1925.
Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.
Endorsed Kimball State Bank, Aug. 7, 1925.

2-6. No. —

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 10, 1925.

Pay to the Order of C. M. & St. P. Ry. Co., $144.39 One Hundred Forty-Four & 39/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 11, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed Kimball State Bank, Aug. 10, 1925.

[fol. 63] 2-7. No. 568.

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 10th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $4.09 Four & 09/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 11, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Aug. 10, 1925.

2-8. No. 570

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 14th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $393.71 Three Hundred Ninety-three & 71/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 15th, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed Kimball State Bank, Aug. 13, 1925.

[fol. 64] 2-9. No. 575

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

8/24, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $165.41 One Hundred Sixty-five & 41/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 25, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Aug. 24, 1925.

2-10. No. 577

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 27, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $408.06 Four Hundred Eight & 06/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 28, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Aug. 27, 1925.

[fol. 65] 2-11. No. 591

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Sept. 21st, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $97.85 Ninety-seven and 85/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Sep. 22, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Sept. 21, 1925.

2-12. No. 594

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Sept. 30th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $75.33 Seventy-five & 33/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 1, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Oct. 1, 1925.

[fol. 66] 2-13. No. 595

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Sept. 30th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $2.25 Two and 25/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 1, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Oct. 1, 1925.

2-14. No. 602

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Oct. 13, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $634.77 Six Hundred Thirty-four & 77/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 15, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed Kimball State Bank, Oct. 13, 1925.

[fol. 67] 2-15. No. 604

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Oct. 16, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $271.31 Two Hundred Seventy-one and 31/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 16, 1925.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Oct. 16, 1925.

2-16. No. 615

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Nov. 4th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $237.71 Two Hundred Thirty Seven & 71/100 Dollars.
Collectible at Par through the Federal Reserve Bank of Minneapolis.
To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 5, 1925.
Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Nov. 4, 1925.

[fol. 68] 2-17. No. 622

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Nov. 19th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $334.23 Three Hundred Thirty-four and 23/100 Dollars.
Collectible at Par through the Federal Reserve Bank of Minneapolis.
To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 19, 1925.
Endorsed: F. T. Gustafson Agt., C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Nov. 19, 1925.

2-18. No. 626

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Nov. 23, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $2.33 Two and 33/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 24, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Nov. 23, 1925.

[fol. 69] 2-19. No. 628

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Nov. 25, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $287.68 Two Hundred Eighty Seven & 68 100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 27, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Nov. 25, 1925.

2-20. No. 629

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Nov. 25th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $3.74 Three and 74/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumbar Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 27, 1925.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Nov. 25, 1925.

[fol. 70] 2-21. No. 632

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Nov. 30, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $446.84 Four Hundred Forty-six and 84/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 30, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-22. N. 647

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 18th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $152.61 One Hundred Fifty Two & 61/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 18, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

[fol. 71] 2-23. No. 652

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 23, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $189.62 One Hundred Eighty Nine and 62/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 23, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-24. No. 653

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 24th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $118.90 One Hundred Eighteen & 90/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 24, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

[fol. 72] 2-25. No. 659

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 30th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $186.63 One Hundred Eighty Six & 63/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 30, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-26. No. 665

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 8th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $1.38 One and 38 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 9, 1926.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.

[fol. 73] 2-27. No. 666

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 9, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $147.84 One Hundred Forty Seven & 84 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 9, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-28. No.670

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 19th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $527.07 Five Hundred Twenty Five & 07/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak., Jan. 19, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-29. No. 673

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 22, 1926.

Pay to the Order of C. M. St. P. Ry. Co. $159.71 One Hundred Fifty Nine & 71/100 Dollars.

[fol. 74] Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 22, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-30. No. 676

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 29th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co., $319.97 Three Hundred Nineteen & 97/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 29, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-31. No. 681

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Feby. 6th, 1926.

Pay to the Order of C. M. St. P. Ry. Co. $89.62 Ninety-Nine & 62 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

[fol. 75] Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Feb. 6, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-32. No. 692

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Mar. 3, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $117.39 One Hundred Seventeen & 39 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Mar. 6, 1926, Kimball, S. Dak.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-33. No. 697

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Mar. 25th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co., $247.87 Two Hundred Forty Seven & 87 /100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Mar. 25, 1926.

Endorsed F. T. Gustafson, Agt., C. M. & St. P. Ry.

[fol. 76] 2-34. No. 698

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Mar. 30th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $312.11 Three Hundred Twelve & 11/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, So. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Mar. 30, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-35. No. 704

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Apr. 8th, 1926.

Pay to the Order of C. M. St. P. Ry. Co. $162.19 One Hundred Sixty Two & 19/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, So. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Apr. 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-36 No. 724

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

May 25th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $2.38 Two & 38/100 Dollars.

[fol. 77] Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Mar. 25, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

DEFENDANT'S EXHIBIT 3

N D N

8629 Kimball, S. D., July 12, 1926.

Fullerton Lbr. Co., Minneapolis, Minn.:

In reply to your letters July 10, your mgr., Mr. J. E. Yarosh, has paid Frt. Bill No. 50 of 7/1 Corrected frt. to $82.76 upon receipt of his memorandum showing weight of 50160. I believe I asked you to send me check or authorize Mr. Yarosh to pay—however this can be adjusted.

In regard to the returned "unpaid" check—$375.96 needless to say that I am very sorry this happened and of course had we known what was going to happen we could have probably avoided this trouble. It surely makes a bad mess of it. It should not be overlooked that the Milwaukee has suffered much loss also as well as others thru the failure of these banks. I cannot see where myself or the Company is to blame. I am advised by our Treasurer that the check was handled promptly thru the Cent'l Trust Co. of Ills. being forwarded by them upon the day received thru the regular channels for collection.

I trust you will consider the matter carefully and save unnecessary trouble by taking this check up promptly. If you will not do this, kindly advise me your refusal.

F. T. Gustafson, Agt.

[fol. 78] DEFENDANT'S EXHIBIT 4

N D N

Chicago, June 16, 1926.

Agent, Kimball, South Dakota.

DEAR SIR: I received, late last week, statement of the Lumbard State Bank dated June 8, 1926 and note that their cash reserve is very low.

Have either of the other banks, which closed in 1924 and 1925 been re-organized and re-opened? If so, I would be greatly obliged if you will send me current statement.

For the time-being, do not exchange collections in excess of $500.00 at the Lumbard State Bank. If collections are in excess of that amount, you may exchange to the amount of $500.00 and enclose draft with the balance of local checks, currency and coin to your specified depository.

I would also greatly appreciate your personal advice regarding the Lumbard State Bank and, if you feel there is any question regarding them, make remittance of your entire collections direct to your specified depository.

Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals.

Yours truly, A. L. Loomis, Treasurer for Receivers.

JD ER.

Stamped: Chi. Mil. & St. P. R. R., June 18, 1926, Kimball, S. D.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 20, 1929

The Defendant in this action, in connection with his Petition for Appeal to the United States Circuit Court of Ap-

peals for the Eighth Circuit, makes the following assignment of errors which he avers occurred upon the trial of the cause, to-wit:

[fol. 79]

I

The Court erred in making said decision, dated November 20th, 1928 and filed November 22nd, 1928, in favor of Plaintiff, upon the facts found and disclosed by the evidence, and said decision should have been made in favor of Defendant, upon the evidence and facts disclosed thereby and found thereby to exist.

II

The Court erred in making the following finding in its said decision:

"The foregoing rule of the Interstate Commission has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. L. & N. Ry. Co. vs. U. S. 219 U. S. 468; N. Y. C. & H. RR. Co. vs. Gray, 239 U. S. 583; Eggleston vs. Plowman (S. D.) 207 N. W. 981."

III

The Court erred in ordering judgment in favor of Plaintiff and said error is contained in the last paragraph of said decision and Order dated November 20th, 1928 and filed November 22nd, 1928, as follows:

"It is therefore the Judgment And Order of the Court that the plaintiff have and recover as against the defendant a judgment in the sum of $375.96 with interest thereon at six per cent from June 25, 1926 and costs of this suit. To all of which plaintiff excepts."

IV

The Court erred in denying Defendant's motion for amended findings, which motion came on to be heard on February 2nd, 1929, said error of the Court being contained

in Paragraph Two (2) of its Order of Denial dated February 2nd, 1929, wherein the Court used the following language:

"In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied, and the Court adheres to its views as set forth in said findings and decision dated November 20th, 1928, that said freight bill was not legally paid by said check therein referred to."

[fol. 80]

V

The Court erred in denying Defendant's motion for a new trial of said action, as set forth in the motion papers dated January 5th, 1929, which motion came on to be heard on February 2nd, 1929, and the Court should have granted Defendant's motion for a new trial on the ground that the Findings, Judgment, Decision and Order of said Court, filed November 22nd, 1928, are not justified by the evidence, and are contrary to Law.

VI

The Court erred in denying Defendant's motion to amend its Answer so as to include therein a counterclaim for damages for Plaintiffs negligence in not properly dealing with or presenting for payment the check involved in said action, and the Court erred, in not vacating and annulling said Judgment, and in not granting a new trial upon said issues of negligence and damage, to the end that the damage caused to Defendant by the negligence of Plaintiff, arising out of the same transaction, be determined by set-off against any amount which might be found to be due to Plaintiff upon said freight bill, upon the theory of the Court's decision; that the evidence introduced upon the issues in this action showed said negligence and damages and the reservation and qualification stated by the Court in Paragraph Twelve (12) of its said decision, dated November 20th, 1928, and filed November 22, 1928, does not adequately protect Defendant's right to litigate said question of negligence and damages and a just decision of this cause requires a more effective and adequate safeguard to litigate said ques-

tion of negligence and of damages, if the decision that said freight bill was not paid be adhered to; that a separate action for damages as allowed in the said decision of said Court would not be available or effective to protect Defendant's rights in the premises.

Wherefore the Defendant prays that the said Judgment of the District Court may be reversed.

Stanley S. Gillam, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota, Attorney for Defendant.

[File endorsement omitted.]

[fol. 81] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Feb. 20, 1929

To the Honorable District Court of the United States for the District of Minnesota, Fourth Division:

The above named Defendant, Fullerton Lumber Company, a corporation, conceiving itself aggrieved by the Order and Judgment made and entered on the 22nd day of November, 1928, in the above entitled cause, which Order and Judgment was dated November 20th, 1928, and signed by Honorable Charles A. Dewey, Judge, does hereby Appeal from said Order and Judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and said Defendant prays that this Appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said Order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Stanley S. Gillam, 1014 Metropolitan Life Building, Minneapolis, Minnesota, Attorney for Defendant.

The foregoing Claim of Appeal is hereby allowed.

John B. Sanborn, United States District Judge.

Dated February 20, 1929.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Feb. 2, 1929

To the above named plaintiff and to Messrs. F. W. Root, C. O. Newcomb, and A. C. Erdall, its attorneys:

SIRS: You will please take notice that the above named Defendant appeals to the Circuit Court of Appeals for the Eighth Circuit, from the Order and Judgment of this Court, dated November 20th, 1928, and made and entered in the [fols. 82 & 83] above entitled cause, in the office of the Clerk of said United States District Court, Fourth Division, on November 22nd, 1928.

Dated February 18th, 1929.

Stanley S. Gillam, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota, Attorney for Defendant.

Service admitted Feb. 2, 1929.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiff.

[File endorsement omitted.]

Bond on appeal for $1,000.00, approved and filed February 25, 1929, omitted in printing.

[fol. 84] Citation, in usual form, showing service on F. W. Root et al., filed February 21, 1929, omitted in printing.

[fol. 85] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD AND ELECTION TO PRINT—Filed Mar. 29, 1929

To Joel M. Dickey, Esq., clerk of said Court, and to Thomas H. Howard, Esq., Deputy Clerk:

SIRS: You are hereby notified that we request that the Transcript of the Record upon appeal to the Circuit Court of Appeals be made up of the following:

1. Complaint.
2. Answer.
3. Reply and Stipulation for filing thereof.
4. Waiver of Jury Trial and Stipulation.
5. Judgment Roll.

[fols. 86 & 87] Assignment of Errors.

7. Petition for Appeal and Order Allowing Appeal.
8. Bond on Appeal.
9. Notice of Appeal.
10. Citation on Appeal.
11. Bill of Exceptions.
12. Praecipe for Record and Election as to Printing.
13. Exhibit.

You are hereby further notified that we elect that the Record be printed under the supervision of the Clerk of the Circuit Court of Appeals at Saint Louis.

Standley S. Gillam, 535 Metropolitan Bank Building, Minneapolis, Minn., Attorney for Defendant.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Appearances of counsel omitted in printing.

[fol. 89] Minute entry of agreement and submission October 7, 1929, omitted in printing.

[fol. 90] In United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1929

No. 8572

Fullerton Lumber Company, a Corporation, Appellant,

vs.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a Corporation, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. Stanley S. Gillam for appellant.

Mr. A. C. Erdall (Mr. F. W. Root and Mr. C. O. Newcomb with him on the brief) for appellee.

Before Van Valkenburgh and Gardner, Circuit Judges, and Woodrough, District Judge

Opinion—Filed Nov. 15, 1929

Woodrough, District Judge, delivered the opinion of the court.

Appellant, Fullerton Lumber Company, doing business at Kimball, South Dakota, gave its check on the Lombard State Bank of that city in payment of freight charges on a car load of coal consigned to it and carried in interstate commerce. The local agent for the railroad company accepted the check as payment and receipted the freight bill. The check was not presented for payment to the bank on which it was drawn until after the bank had closed its doors [fol. 91] which was six days after delivery of the check, and consequently it was never paid although the lumber company had at all times sufficient deposit with the bank to cover it.

The suit of the railroad company was to collect the freight charges, and the lumber company pleaded in answer that the freight charges had been paid. The railroad replied that it had received the check of the lumber company but that said check was duly presented to the bank

and payment refused, and it denied that the freight charges had been paid.

The theory of the lumber company on the trial to the court (jury having been waived) was that the railroad company was negligent in not presenting the check for payment, and that under the law merchant the freight was paid. The railroad company contended that it is unlawful for it to receive or accept anything but money in payment of freight charges; that its freight charges in this instance were not so paid in money and therefore it was entitled to recover. The trial court sustained the contention and rendered judgment for the railroad company accordingly. Thereafter the lumber company moved the court for leave to amend its answer so as to include a counterclaim for damages for the railroad's negligence in not properly dealing with or presenting for payment the check involved in this action. The motion was denied and both the judgment and this ruling on the motion are presented for review.

We are satisfied that the trial court did not err in rendering judgment for the freight charges, and approve the conclusions stated by the trial court as follows:

"The Interstate Commerce Commission adopted a rule dated September 15, 1906, known as Conference Ruling 207, reading as follows:

" '207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates of fare in effect at [fol. 92] the time, precludes the acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules.' "

"The foregoing rule of the Interstate Commerce Commission has the force and effect of United States Statute, and it must follow that the payment by the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. L. & N. Ry. Co. v. U. S., 219 U. S.

486; N. Y. C. & H. R. R. Co. v. Gray, 239 U. S. 583; Eggleston v. Plowman (S. D.) 207 N. W. 981."

In the case of L. & N. R. R. v. Mottley cited by the trial court the declaration is found in the third syllabus, "the statute means that transportation shall be paid for by all alike and only in cash", and the exhaustive opinion of the court justifies and settles the conclusion. It is reiterated and adhered to in C. I. & L. Ry. Co. v. U. S., 219 U. S. 486, and followed in L. & N. Ry. Co. v. Maxwell, 237 U. S. 94 and N. Y. C. & H. R. R. Co. v. Grady, 239 U. S. 583.

In the case of Eggleston v. Plowman also cited by the trial court it appeared that a taxpayer had delivered a draft to the county treasurer in payment of taxes. The county treasurer hold the same for three weeks and until after the bank had failed. The statute of the state forbade the payment of taxes in anything but money and the court said:

"It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid. These propositions are conceded by appellant, but he undertakes to apply to the defendant as a public official the same rule that would obtain between private individuals, and to maintain that the draft, although conditional payment when offered, yet, having been retained by the defendant instead of being refused and returned, defendant's want of diligence in presenting it for payment operates to extinguish plaintiff's obligation.

"We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual, whose duty it is under the law to pay his taxes and pay them [fol. 93] in money, and a public officer, whose duty it is to collect the taxes and collect them in money."

On the question whether a counterclaim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the

freight charges, and we think this conforms to the intent of congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burdensome to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers the whole intent and purpose of congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers the suits would inevitably open the door to gross discriminations under color of counterclaims and offsets which the courts could not prevent In fact a measure of discrimination is present as soon as a counterclaim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counterclaims or offsets and then they can not be adjudged to pay their freight charges until all such matters of counterclaim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of congress to abolish them all is clear. The federal courts are also bound to the same purpose, and, as the practice of permitting counterclaims in these suits tends to defeat the purpose the practice should not be permitted even though there is a statute of the state sanctioning counterclaims generally in law actions.

[fol. 94] We agree with the conclusions of Judge Munger in C. & N. W. Ry. Co. v. Stein, 233 Fed. 716; Judge Wade in Illinois Central R. R. Co. v. Hoopes, 233 Fed. 135, and Judge Cochran in Penn. R. R. Co. v. So. Car. Produce Ass'n,

25 Fed. (2d) 315. The decisions to the contrary have received careful consideration but we do not deem them controlling. C. & N. W. Ry. Co. v. Tecktonius Mfg. Co., 262 Fed. 715; Wells Fargo Co. Cuneo, 241 Fed. 727; Payne v. Clarke, 271 Fed. 525; Nashville C. & St. L. Ry. Co. v. Tennessee Mill Co., 227 S. W. 443. The trial court rightly denied the motion to permit a counterclaim to be presented.

The following paragraph appears in the "Findings of Fact and Conclusions of Law" made by the trial court:

"This decision and the following judgment is made without prejudice to the defendant to bring an action against the plaintiff or its assignor for loss resulting from the failure to present the check for payment within a reasonable time, or any other negligence or negligent acts on the part of this plaintiff or its assignor."

The judgment following is in the ordinary form of money judgment for the amount due, interest and costs, and awarding execution.

This court affirms the judgment entered by the trial court because the evidence and facts found compelled that judgment.

We express no opinion as to the effects of the litigation in any other controversy that may arise between the parties.

The judgment is affirmed.

[fol. 95] In United States Circuit Court of Appeals
Eighth Circuit

No. 8572

Fullerton Lumber Company, a Corporation, Appellant,

vs.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a Corporation

Appeal from the District Court of the United States for the District of Minnesota

Judgment—Nov. 16, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, have and recover against the Fullerton Lumber Company, a corporation, the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 96] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 17, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,795. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 664. Fullerton Lumber Company, petitioner, vs. Chicago, Milwaukee, St. Paul & Pacile Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed February 14, 1930. File No. 34,795.

FILE COPY

FEB 14 19[illegible]
Clerk

Supreme Court of the United States

OCTOBER TERM, 1929.

No. [redacted] 47

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

STANLEY S. GILLAM,
535 Metropolitan Bank Bldg.,
Minneapolis, Minnesota,
Attorney for Petitioner.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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Supreme Court of the United States

OCTOBER TERM, 1929.

No.....

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.*

Your petitioner, Fullerton Lumber Company, respectfully states that it is greatly aggrieved at the rendition on the 15th day of November, 1929, of a judgment of the United States Circuit Court of Appeals for the Eighth Circuit against it in favor of the respondent, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in the sum of $375.96, together with interest and costs (R. ....).

Your petitioner respectfully states that this is a case brought by the railroad evidently to establish a new and novel proposition of law to the effect that checks cannot be used by shippers in connection with payment of freight bills, and to engraft into the law a new and hitherto undecided doctrine to the effect that a carrier is immune from

*References herein are to the pages of the Printed Record.

the ordinary liabilities which follow the mishandling of a check by him who receives it in payment of an obligation, as prescribed and laid down by the generally accepted rules of the Law Merchant. The case also involves the determination of a conflict in the decisions of the United States District Courts upon the question whether a counter-claim may be interposed in an action for freight charges brought by a common carrier, a question decided for the first time by a Circuit Court of Appeals in this case, and which question we believe has never been considered or decided by this Court. While the amount involved is comparatively small the effect of the judgment is far-reaching and the case is an important one, not alone to your petitioner but to all carriers and shippers. If the judgment of the Circuit Court of Appeals stands, it necessarily means a widespread change in the relationships of carriers to their patrons and will require shippers to accept a burden and a liability which has not hitherto been upon them.

Your petitioner now prays this Honorable Court for a writ of certiorari so that said judgment may be reviewed and reversed.

Your petitioner shows that this action was brought by the respondent against petitioner in the United States District Court for the District of Minnesota to recover the freight charges on the shipment of a carload of coal transported from Norfolk, West Virginia, to Kimball, South Dakota, over railroad lines of which respondent formed the last carrier. The coal arrived at Kimball on June 16, 1926, consigned to petitioner, it was delivered and on June 19, 1926, respondent's agent presented the freight bill to petitioner's agent for payment. This freight bill was then and there paid by the delivery to the carrier of a proper check on the Lumbard State Bank of Kimball for the correct

amount, and the freight bill was receipted and delivered by the agent of respondent to petitioner's agent. Instead of presenting the check for payment not later than the next succeeding business day, as the Law Merchant requires, respondent's agent sent it on a nine days' journey, first sending it to Chicago for deposit. Six days after the check was given, the Lumbard State Bank of Kimball closed its doors. Nine days after delivery the check reached Kimball and was dishonored when presented for payment to the bank on which it was drawn. Claiming that it is under no responsibility for its wrongful dealing with the check, respondent demanded that petitioner pay over again the sum of $375.96, the amount of the freight bill, and upon petitioner's refusal respondent brought this action in the United States District Court for the District of Minnesota to recover that amount. It is practically conceded that, were respondent an individual, he could not recover; that the law is settled that he who negligently fails to present the check promptly must stand the loss thereby caused, and that the check thereby operates as absolute payment. But the carrier contends that it is above and beyond this salutary rule, is not bound thereby, and that it can recover even though its own wrongful act was the cause of the loss. No decision to this effect is cited by the carrier, but it contends that it has the same immunities from liability as a sovereign government in collecting taxes, and cites the South Dakota case of *Eggleston vs. Plowman*, 49 S. D. 609, 207 N. W. 981, by analogy. It also insists that Interstate Commerce Commission Conference Ruling 207, adopted September 15, 1926, providing that nothing but money can be received in payment for transportation, governs the case, the argument being that a check is not money and, therefore, that it makes no difference how wrongfully the carrier

dealt with the check after it had received it. Petitioner contends that there is neither authority nor reason for giving to a private, profit-making carrier corporation the immunities of a government collecting taxes, and that the argument founded on Interstate Commerce Commission Ruling 207 is beside the point, for a check is not an uncertain claim for personal injuries (*Louisville & Nashville Railway Company vs. Motley*, 219 U. S. 467), nor is it magazine advertising of uncertain value (*Chicago, Indianapolis and Louisville Railway Company vs. United States*, 219 U. S. 486), nor is it a map or other property of uncertain worth sought to be traded for passenger rides (*New York Central & Hudson River Railroad Company vs. Gray*, 239 U. S. 583), but it is an order, ready to be promptly honored, for United States currency of exact amount, or gold or silver coin, upon proper presentation by the holder thereof, and petitioner contends that the sole and only reason why the carrier failed to receive gold, silver, greenbacks, or whatever it thought it ought to have in discharge of this freight bill is its own failure to take a five minute walk to the bank, present the check and get the currency there awaiting such proper presentation.

The case was tried to the Court, Honorable Charles A. Dewey, Judge, as a result of which the Court upheld the contentions of the carrier and, on November 20, 1928, judgment was entered for the recovery of the full amount sued for, with interest and costs (R. 11-14). This decision and judgment of the District Court were expressly made without prejudice to the defendant to bring a separate action for loss resulting from the failure to present the check within a reasonable time (R. 13). Thereafter petitioner moved for new trial and for leave to interpose in this action a counterclaim for damages for negligent failure to

properly present the check. These motions were denied (R. 46-48), and thereafter appeal was taken from the judgment to the Circuit Court of Appeals for the Eighth Circuit (R. 78-87).

The Circuit Court of Appeals for the Eighth Circuit, on November 15, 1929, rendered its decision and entered judgment affirming the District Court (*Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 36 F. (2d) 180). Its opinion quotes the language of the District Court with approval, on the main point in the case, and with respect to the filing of counterclaim recognizes the conflict in the decisions of the District Courts, upholding the decisions disallowing it and overruling those permitting it. No distinction is made between counterclaims unrelated to the cause of action sued upon and those growing out of the very matter for which action is brought.

Importance of the Case.

The decision of this case by this Court will settle the question whether the general, if not well-nigh universal, practice of paying freight bills by check, of making remittances of money for such payment, by check, is a wrongful practice. It will settle the question whether a common carrier is exempt from the ordinary responsibilities of individuals in dealing with checks which it has accepted. It will resolve the uncertainty and confusion which are the natural result of the two decisions of the Courts below in this case. It will indicate this Court's views on the question whether the rule against discrimination prevents the assertion in actions for freight charges of counter-claims for damages growing out of the negligent or wrongful acts of the carrier which directly concern or affect steps which the shipper has taken to

make payment of such freight charges. It will determine the question whether, in this third decade of the twentieth century, a freight bill cannot be properly and safely paid unless the shipper obtains a bag of gold and transports it to the carrier's vaults. These are important and practical questions to the whole business community.

The Essential Error of the Decision of the Circuit Court of Appeals.

Not only do the questions involved deserve to be decided by this Court, but the decision of the Circuit Court of Appeals is in error and should be reversed by this Court.

Assuming the Interstate Commerce Commission Ruling 207 to be correct, it does not follow that the carrier, which by its own act has prevented the shipper's hand from effectually reaching his money drawer, is absolved from responsibility therefor. Both opinions seem to admit this, but nevertheless they proceed to a conclusion protecting the carrier and allowing it to recover, when there is in fact no logical necessity for reaching such conclusion (R. 13, 1st and 2nd full paragraphs from bottom of page; 36 F. (2d) 180, 181). If the shipper is to be allowed to sue in a separate action for the wrongful handling of the check, it is error to deprive him of the right to assert that responsibility in this action *for that wrong goes to the very matter in issue in this action and is a complete answer to and explanation of the default alleged in the cause of action sued upon.*

Novelty of the Case: Conflict of Decisions.

The question whether a carrier can recover the amount of a freight bill when it has failed to properly present a check previously received in payment thereof has never, we believe,

been decided by a Federal Court prior to the decisions of the District Court and Circuit Court of Appeals in this case. In the state District Court of Pocahontas County, Iowa, in the case of *Chicago, Rock Island & Pacific Railway Company vs. Fullerton Lumber Company*, the issue was decided against the carrier on facts practically identical with those in the case at bar. This decision, unreported, is dated October 20, 1928. It was not appealed to the state Supreme Court. In *Chicago, Milwaukee & St. Paul Railway Company vs. Bradshaw*, tried in the state Circuit Court of Brule County, South Dakota, in an unreported opinion dated June 25, 1928, the decision was in favor of the carrier and was not appealed to the state Supreme Court, but it is probable that that case was not contested by the shipper and was in effect settled by stipulation.

The general question whether a counter-claim can be set up in an action for freight charges was decided favorably to the shipper in *Wells-Fargo & Co. vs. Cuneo* (D. C. S. D. N. Y., Judge Mayer), 241 Fed. 727 (in which Judge Mayer refused to follow *C. & N. W. Ry. Co. vs. Stein*, 233 Fed. 716, and *Illinois Central R. R. Co. vs. Hoopes*, 233 Fed. 135, to the contrary); *C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co.* (D. C. E. D. Wis., Judge Geiger), 262 Fed. 715; *Payne vs. Clarke* (D. C. S. D. Cal., Judge Bledsoe), 271 Fed. 525; *Battle vs. Atkinson*, 9 Ga. App. 488, 71 S. E. 775; *Central, etc., vs. Birmingham, etc.*, 9 Ala. App. 419, 64 So. 202; *Nashville, etc., vs. Tennessee Mill Co.*, 143 Tenn. 237, 227 S. W. 443; *Penn. R. R. Co. vs. Bellinger*, 101 Misc. Rep. 105, 166 N. Y. S. 652; *N. Y. Central R. Co. vs. Federal Sugar Refining Co.*, 201 App. Div. 467, 194 N. Y. S. 467.

In the Tecktonius case, the counter-claim appears to have been for damages for goods lost on shipments other than the shipment in question. In the other Federal cases above cited

favorable to the counter-claim, the counter-claim was for damages to the very shipment for which freight charges were sought to be collected.

In the following cases, the question of counter-claim was decided unfavorably to the shipper: *Illinois Central R. Co. vs. Hoopes* (D. C. S. D. Iowa, Judge Wade), 233 F. 135 (counter-claim for negligent transportation of the shipment); *C. & N. W. R. Co. vs. Stein* (D. C. Neb., Judge Munger), 233 F. 716 (counter-claim for negligence in transportation causing damage to the shipment); *Johnson-Brown Co. vs. Railroad* (D. C. S. D. Ga., Judge Speer), 239 F. 590 (counter-claim for damages for negligent transportation of the shipment); *Oregon-Washington Railroad & Nav. Co. vs. Cascade Contract Co.*, 101 Ore. 582, 197 P. 1085, 1088, 200 P. 1034; *D. L. & W. R. R. vs. Nuhs*, 93 N. J. Law, 309, 111 A. 223; *Adams Express Co. vs. Albright Bros.*, 75 Pa. Super. Ct. 410; *N. Y. S. W. R. R. Co. vs. Ruthren*, 88 Pa. Super. Ct. 510.

The extent of the conflict in the decisions, and the uncertainty of the law in the Federal Courts, prior to the decision in the case at bar, is stated by Judge Cochran in *Pennsylvania R. R. Co. vs. South Carolina Produce Assn.*, 25 F. (2d) 315, as follows:

> "There is no decision directly in point by the Supreme Court of the United States, nor by any of the Circuit Courts of Appeals, and the decisions of the District Courts and of the state courts are in hopeless conflict."

In such a situation, and in view of the practical importance of the questions involved, it would seem that there is a manifest practical necessity of a decision by this Court to settle not alone this case, but to lay down for future guidance of the Courts of the country the proper rules to apply

in respect to the shipments in interstate commerce shown to be involved. The Interstate Commerce Act of February 4, 1887, as amended by subsequent acts (U. S. Cod, Tit. 49, Section 6, Paragraph 7, 49 U. S. C. A., Section 6 (7), Comp. St. Section 8569 (7), is directed at discrimination and does not in terms or in substance determine the matter.

STATEMENT OF THE CASE.

The case was an action at law tried to the Court without a jury, a stipulation having been signed and filed waiving jury trial (R. 8-9). The facts are not substantially in dispute and there was very little, if any, conflict in the evidence presented.

The respondent is a railroad corporation of the State of Wisconsin and is a common carrier of freight with its connecting lines from Norfolk, West Virginia, to Kimball, South Dakota. The petitioner is a corporation, a resident of the State of South Dakota, having its principal headquarters at Minneapolis, Minnesota, and conducting one of a line of yards at Kimball, South Dakota (R. 1-2, 4-5).

On June 9, 1926, the carload of coal in question, containing 104,000 pounds of coal, was delivered to the initial carrier at Norfolk, West Virginia, and consigned to the Fullerton Lumber Company at Kimball, South Dakota, over the lines of the respondent railroad company as the last or final carrier. It was admitted that the transportation took place substantially as alleged by respondent (R. 3). The car was Norfolk & Western car No. 93360, originally delivered to the Norfolk & West Virginia Railroad, for transportation over its line of railway and its connecting common carriers in interstate commerce (R. 3).

When the case duly came on for trial before Judge Dewey,

without a jury, Forest T. Gustafson, the Milwaukee agent at Kimball, was called by respondent as its first witness (R. 15), and he testified to the shipment, that the car was delivered at the Fullerton Lumber Company yard at Kimball on June 17, 1926, and unloaded on the 19th, that he presented the freight bill for payment between the hours of two and three in the afternoon of June 19, 1926, to Mr. Yarosh, the Fullerton agent at Kimball, that Yarosh paid it by giving a Fullerton Lumber Company check for $375.96 upon the Lumbard State Bank of Kimball, and he thereupon receipted the freight bill as paid and gave it to Yarosh (R. 16).

Instead of presenting the check for payment at the bank upon which it was drawn, at Kimball, on that same day, or before the close of business on the next business day, Monday, June 21st, the Railway Company's agent, Gustafson, sent the check by express, with other collections, on the east-bound 10:35 Sunday morning Milwaukee train, on June 20th, 1926, to Chicago for deposit. The check was not presented for payment at the Lumbard State Bank of Kimball, the bank upon which it was drawn, until June 28, 1926, nine days after it had been delivered to the Railway Company's agent (R. 33), and it was not honored by the bank, although at all times the Fullerton Lumber Company had on deposit sufficient funds to cover it (R. 34), for the reason that about noon on Friday, June 25, 1926, the bank closed its doors (R. 23-28). If Mr. Gustafson, the Milwaukee agent, had immediately obtained from the bank the currency called for by the check, or if the bank had not closed its doors, the check would have been paid when it arrived and the controversy involved in this litigation would not have arisen. The railroad does not deny that an individual is under the duty of presenting the check for payment on the same or next

succeeding business day, but the railroad contends that a ruling of the Interstate Commerce Commission protects it from the effect of the rules of law which ordinarily govern such a situation.

When Yarosh delivered the check to Gustafson, he then and there deducted $375.96 from his bank balance as shown on his stub (R. 39), and Gustafson marked the freight bill "Received payment 6/19/1926, F. T. Gustafson" and delivered it to Yarosh so receipted (Exhibit A, page 51; R. 33, 16).

By this transaction, both parties agreed that the obligation on the freight bill was discharged (R. 16). Gustafson put the check in his cash drawer, treating it as a collection (R. 16). The transaction was duly completed some time prior to 3 P. M., Gustafson returning two blocks to the depot in time to take care of his duties prior to departure of the 3 P. M. west-bound train (R. 23). The Lumbard State Bank was about two minutes' walk, two blocks' distance, from the lumber yard office, was open at the time the check was delivered, and did not close for the day until about an hour after the 3 P. M. west-bound had left (R. 23-24). Gustafson never asked Yarosh for cash or currency in payment of freight charges, taking the check in final payment in the same manner as he had done scores of times before (R. 42), and no question as to the finality of the transaction arose so as to come to the attention of Yarosh until, on June 29, 1926, ten days after the check was delivered, he was for the first time notified that the check had not been paid by the bank (R. 33).

Gustafson was recalled, in an effort to overcome this testimony by Yarosh, but he admitted the conversation substantially as Yarosh related it, except that he tried to deny that embarrassment of the bank was given as one reason for

sending the check down to Chicago, 660 miles away from Kimball and from the bank on which it was drawn (R. 40-41).

John Dickey, assistant treasurer of the Milwaukee at Chicago, was the only other witness who testified on behalf of respondent (R. 27), and he stated that on June 16, 1926, three days before the check was delivered in payment of the freight bill, he had by letter instructed Mr. Gustafson, as local agent at Kimball, to send checks drawn upon local banks there to the Central Trust Company of Illinois at Chicago for deposit.

The testimony of John Dickey, assistant treasurer of the Railway Company, shows that the matter was left much to the discretion of the local agent (R. 28-29; Exhibit 4, page 78), depending upon whether he felt any question about the bank, and this testimony tends to substantiate Yarosh, whose testimony throughout is full, frank and obviously candid and sincere.

No question is, or can be, made in this case as to the authority of the railway agent at Kimball, Mr. Gustafson, to receive the check in payment and receipt the freight bill (see R. 42).

Mr. Yarosh, the Fullerton agent at Kimball, testified on behalf of petitioner that for a long time prior to June 19, 1926, he had, as a uniform practice, paid all freight bills owed to the Milwaukee by check on the Lumbard State Bank of Kimball, that these checks had always been indorsed by Gustafson and presented for payment by Mr. Gustafson on the same or next succeeding business day, and that, on the occasion in question, he had no notice from Mr. Gustafson that the check was to be handled in any different manner (R. 33-35). It is clear that all parties agreed and understood that the freight bill was paid when the check was de-

livered. Mr. Gustafson receipted the bill (R. 16), and some months later the Milwaukee confirmed this understanding by honoring and paying a claim for refund of a portion of the amount paid by giving its draft to the Fullerton Lumber Company (R. 31-32), which draft was paid. This draft was a refund of a portion of the sum of $375.96 previously paid by delivery of the check involved in this controversy.

Mr. Yarosh had been the agent in charge of the Fullerton Lumber Company's yard at Kimball ever since the yard began to be operated by the Fullerton Company, in June of 1922 (R. 32). He had always paid the freight bills by check, such checks had always been accepted by the Railway Company in full and final payment and no question regarding such payment had ever been raised by the Railway Company prior to the case at bar (R. 35).

The check in controversy is No. 738 of the Fullerton Company, for $375.96, and it was dated and delivered on June 19, 1926 (R., Exhibit C, page 55).

Check No. 737, the next preceding one, is also in evidence (R., Exhibit 1, page 59). This check, for $502.70, was dated and delivered on June 15, 1926, four days earlier, and it likewise was accepted in payment of a freight bill (R. 20-22, 34). It covered the freight on two cars of coal (R. 34-35). That check was presented for payment to the Lumbard State Bank of Kimball the same day on which it was drawn and delivered, and it was duly paid on that same day (R., Exhibit 1, page 59).

Thirty-six prior checks, beginning with number 548, for $147.15, dated and delivered June 11, 1925, to and including number 724, for $2.38, all drawn on the Lumbard State Bank of Kimball by Fullerton Lumber Company and made payable to the Railway Company, and delivered to and accepted by the railway in payment of freight charges, are in

evidence (R., Exhibit 2, pages 60-77). These checks cover all of the transactions between the Railway Company and the Fullerton Company for more than a year prior to June 19, 1926. In not one of these transactions was any question ever raised by the railway company as to the manner of payment; ever since 1922 this was the manner and medium by which freight charges were paid, in these transactions between these two parties, and never at any time did the Railway Company raise any question as to the propriety of this method of payment. It is the common and the usual manner of payment under modern business conditions. All of these checks show presentation for payment before the close of the next succeeding business day.

The Fullerton Company had ample funds on deposit at the Lumbard State Bank to cover its check (R. 34), and Yarosh could himself have gone to the bank and obtained bank notes, gold or silver certificates, legal tender notes or greenbacks, or gold or silver, whatever Gustafson required, upon his check. But Gustafson was willing to and did accept the check and himself undertake to get the currency upon it. As Gustafson wrote under date of July 12, 1926, in his letter addressed to the Fullerton Lumber Company at Minneapolis:

> "In regard to the returned 'unpaid' check—$375.96, needless to say that I am very sorry this happened and of course had we known what was going to happen we could have probably avoided this trouble. It surely makes a bad mess of it" (R., Exhibit 3, page 77; R. 24-25).

As soon as he learned that the check had not been promptly presented and had not been honored, which was ten days after its delivery, and on June 29, 1926, Yarosh immediately

took the matter up with Gustafson. He testified as follows:

"Q. When did you first learn that the check had not been paid by the bank?

A. On June 29.

Q. What did you do when you received that notice?

* * * * * * * * *

A. I went right down to the depot to see Mr. Gustafson.

* * * * * * * * *

A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes, and Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embarrass the bank. I told him why didn't he say something, I could have got him the cash from the bank" (Yarosh, R. 33-34).

Again, Yarosh testified with respect to who was to go and get the currency as follows:

"Q. On the 19th day of June, 1926, did Mr. Gustafson say anything to you about currency in payment of the freight bill? Did he ask for currency?

A. No, sir.

Q. Did he at any previous time?

A. No, sir.

Q. Nothing was ever said by him about currency?

A. No, sir.

Q. He never demanded cash, or currency, from you in payment of freight bills?

A. No, sir" (Yarosh, R. 39).

Contention of Petitioner.

Petitioner insists:

(1) That the Court should have entered judgment in favor of petitioner, that respondent take nothing by its action, and for costs and disbursements.

(2) That when the carrier's agent took the check, it was thereafter within his power to obtain the currency upon it, and that thereafter it was not within the power of the Fullerton Company's agent to deal with or obtain currency upon the check.

(3) That after taking the check it was the duty of the carrier's agent to go directly to the bank and obtain currency upon it.

(4) That, by reason of his failure to do this and of his affirmative act in sending the check on a nine days' journey to Chicago, he, and he alone, prevented the act of making and delivering the check from successfully resulting in the transfer of greenbacks or gold from the Fullerton Company to the railroad.

(5) That there is nothing in paragraph 7 of Section 6 of the Interstate Commerce Act (U. S. Code, Tit. 49, Sec. 6, Paragraph 7, 49 U. S. C. A., Sec. 6 (7)) which affects the question; or which relieves the carrier from the necessary consequences of its own acts.

(6) That Interstate Commerce Commission Conference Ruling No. 207, providing that freight bills shall be paid in money, does not govern the case.

(7) That there is no Federal law precluding the use of checks as a mechanism for remitting money, nor abrogating

the responsibilities of a holder of a check as determined by common and statute law.

(8) That there is no Federal law providing in terms or by implication that freight bills can only be paid by the immediate transfer of greenbacks, gold or silver.

(9) That to deny the right of counter-claim to petitioner, to be asserted in this action, greatly prejudices petitioner, and in substance allows respondent recovery on a cause of action which could not exist apart from respondent's own wrong. In any separate action to recover damages for that wrong, the evidence would be identical with the evidence in the case at bar.

(10) That the authorities cited in the opinions of the courts in this case opposing allowance of counter-claim do not involve the *kind* of counter-claim presented in the case at bar.

SPECIFICATIONS OF ERROR.

Petitioner now files the following as its assignment or specification of errors:

Petitioner complains that the following errors were committed by the United States Circuit Court of Appeals for the Eighth Circuit:

(1) The Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court and in entering its judgment, dated November 15, 1929, to that effect, said judgment of the District Court so affirmed being as follows:

> "It is therefore the judgment and order of the Court that the plaintiff have and recover as against the defendant a judgment in the sum of $375.96, with interest

thereon at six per cent from June 25, 1926, and costs of this suit. To all of which plaintiff excepts" (R. 13-14).

(2) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the respondent was entitled to recover the amount claimed in the summons and complaint herein.

(3) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the evidence and facts found by the District Court compelled the judgment.

(4) The Circuit Court of Appeals for the Eighth Circuit erred in approving the conclusions stated by the trial court in its opinion, as quoted in the opinion of the Circuit Court of Appeals.

(5) The Circuit Court of Appeals for the Eighth Circuit erred in approving the following finding of the District Court:

> "The foregoing rule of the Interstate Commerce Commission (referring to Interstate Commerce Commission Conference Ruling 207) has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. *L. & N. Ry. Co. vs. U. S.*, 219 U. S. 468; *N. Y. C. & H. R. R. Co. vs. Gray*, 239 U. S. 583; *Eggleston vs. Plowman* (S. D.), 207 N. W. 981" (R. 13).

(6) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for amended findings, which motion came on to be heard on February 2, 1929, and which denial by the District Court was as follows:

"In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied and the Court adheres to its views as set forth in said findings and decision, dated November 20, 1928, that said freight bill was not legally paid by said check therein referred to" (R. 48).

(7) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for a new trial of said action as set forth in the motion papers, dated January 5, 1929, which motion came on to be heard on February 2, 1929, and the Court should have reversed the ruling of the District Court and should have ordered the granting of petitioner's motion for a new trial on the ground that the findings, judgment, decision and order of said District Court, filed November 22, 1928, are not justified by the evidence and are contrary to law (see R. 46).

(8) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the ruling of the District Court denying petitioner's motion to amend its answer so as to include therein a counter-claim for damages for respondent's negligence in not properly dealing with or presenting for payment the check involved in said action, and the Circuit Court of Appeals for the Eighth Circuit erred in not vacating and annulling the judgment of the District Court and in not ordering the granting of a new trial upon said issues of negligence and damage, to the end that the damage caused to petitioner by the negligence of respondent, arising out of the same transaction, might be determined and set off against any amount which might be found to be due to

respondent upon said freight bill, if the theory of the decision of the District Court be approved; that the evidence introduced upon the issues in this action conclusively showed said negligence and damages and the reservation and qualification stated by the District Court in paragraph twelve of its said decision, dated November 20, 1928, and filed November 22, 1928, does not adequately protect petitioner's rights to litigate said question of negligence and damages and a just decision of this cause requires more effective and adequate safeguard of the right to litigate said question of negligence and damages if the decision that said freight bill was not paid be adhered to; that a separate action for damages as allowed in the decision of said District Court and as affirmed by the decision of said Circuit Court of Appeals would not be effective to protect petitioner's rights in the premises (see R. 47-48; 13).

WHEREFORE, The petitioner prays that the judgment herein be reversed and the cause remanded with directions to the Circuit Court of Appeals for the Eighth Circuit to enter a judgment reversing the District Court and directing that Court to enter judgment as prayed for by the petitioner, dismissing said action and awarding petitioner costs and disbursements and in case this be denied by this Court then directing said Circuit Court of Appeals for the Eighth Circuit to enter a judgment reversing the District Court and directing that Court to allow a counter-claim for damages for negligent handling of the check to be pleaded and proved and the amount of said damages set off against any recovery allowed herein.

PRAYER.

Your petitioner now prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit and the Justices thereof, commanding that Court to certify and send to this Court a full and complete record of the transcript and all the proceedings of said United States Circuit Court of Appeals in this cause entitled *Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, No. 8572—on the docket of said United States Circuit Court of Appeals, to the end that this cause may be reviewed and determined by this Court.

And your petitioner prays that the certified copy of the record and proceedings of the United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in this cause and every part thereof be reversed by this Honorable Court and this your petitioner will ever pray, etc.

This is the first application for writ of certiorari in this cause.

FULLERTON LUMBER COMPANY,
BY STANLEY S. GILLAM,
Counsel for Petitioner.

District of Minnesota)
State of Minnesota) ss.
County of Hennepin)

Stanley S. Gillam, being first duly sworn, makes oath that he is the counsel for petitioner in the above cause and that he prepared the foregoing petition, and that the allegations therein contained are true as he verily believes.

STANLEY S. GILLAM.

Subscribed and sworn to before me this 10th day of February, 1930.

Frank E. Norton,
(Notarial Seal) Notary Public,
Hennepin County, Minnesota.

My Commission Expires Feb. 5, 1933.

In my opinion the foregoing petition is well founded in law.

STANLEY S. GILLAM.

Supreme Court of the United States

OCTOBER TERM, 1929.

No.....

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The official report of the decision below, of the Circuit Court of Appeals, is to be found in 36 F. (2d) 180. The decision of the District Court is unreported, but may be found at pages 11-14 of the printed Record herein.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Eighth Circuit by virtue of Section 2 of Article III of the United States Constitution. The case involves and arises under a law of the United States. Section 240 of the Judicial Code of the United States, as amended, provides for and allows the method of review herein employed.

The judgment below is printed at the end of the record filed herein, and the date thereof is November 15, 1929. The petition for writ of certiorari herein is filed within three months thereof.

That this case arises under and is based upon the Act to Regulate Commerce, passed February 4, 1887, and amendments thereof and supplements thereto, is shown at pages 2, 13, 79 of the printed Record. We do not admit that this case is or should be governed by that Act. But respondent has sought to make it so governed. The matters so relied upon are paragraph 7 of Section 6 of the Interstate Commerce Act, Title 49 of United States Code, and Interstate Commerce Commission Conference Ruling No. 207. The pertinent paragraph of the Interstate Commerce Act is as follows:

> "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" (Tit. 49, Sec. 6, Par. 7).

Interstate Commerce Commission Conference Ruling No. 207 was adopted September 15, 1906, and is as follows:

> "207. Payment for Transportation. Nothing but

money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates of fare in effect at the time, precludes the acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules."

(See pamphlet publication of I. C. C. Rulings.)

It is these provisions which the Circuit Court of Appeals for the Eighth Circuit and the District Court have applied, at respondent's insistence, to allow recovery herein and to place upon petitioner the burden of loss caused solely by the acts of respondent. Not only is there no direct authority for such an application of them, but there is weighty authority to the contrary.

In *Davis vs. Akron Feed & Milling Company*, 296 Fed. 675, Circuit Court of Appeals, Sixth Circuit, the agent of the railroad company erroneously told the consignee that the freight charges on a shipment had been paid to Chicago. The consignee settled with the consignor on that basis, and allowed him credit for these freight charges. In fact the charges for freight for this part of the haul had not been paid. The consignor had become insolvent so that no collection could be had from him. The carrier then sued the consignee for the unpaid freight charges and the defendant therein set up the defense that it had relied upon the statement made by the carrier's agent, and had a right to rely upon it. The carrier asserted that this was no defense, because under the Hepburn Act it was required to collect all

freight charges and do it in money. The court held in favor of the consignee, that the carrier was estopped from demanding further payment of freight from the defendant. In holding that these common law rules applied, the Court said:

> "If the matter were one wholly between the carrier and the consignee, there would be no question that the carrier's representation would estop it from demanding further payment of freight. While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected."

And the court in this case went on to say:

> "In this case no presumption obtains that the consignee knew that the freight upon this consignment from Kansas City to Chicago had not been paid. This was not a matter of public knowledge. While the question of legal liability is not free from doubt, *the equities are clearly with the consignee, and we are not impressed that the public interest demands such construction of the law as would make the consignee suffer a loss due to the fault, negligence and misrepresentations of the carrier.*"
>
> *Per Curiam Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675, 677 678, C. C. A., Sixth Circuit, 1924.

The case just cited shows with conclusive effect that the Interstate Commerce Act in its provisions against discrimination in charges does not abrogate the Law Merchant or

deprive a shipper of the benefit of the salutary rule that he is not to be held liable for a non-payment in currency of freight charges caused by the act of the carrier.

In *Pennsylvania R. R. Co. vs. Olivit Brothers*, 243 U. S. 574, an action by a shipper for damages for negligent transportation of carloads of watermelons, the carrier sought to prevent the shipper from recovering as part of the damages the freight charges paid, by recourse to the same section of the Interstate Commerce Act relied upon by respondent in the case at bar. The defence was that such recovery would violate the statutory prohibition against discrimination. This Court overruled the defense, holding it untenable in the absence of a showing of an actual or attempted evasion of the statute. We deem the case at bar similar in its essential questions to the Olivit case.

> "A party to a contract cannot take advantage of his own act or omission to escape liability thereon, hence where he causes or sanctions a breach, he cannot recover damages for non-performance or interpose the breach as a defense to an action on the contract. Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him."
>
> 13 *Corpus Juris* 647.

See also:

Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300.

Barton vs. Gray, 57 Mich. 622, 24 N. W. 638.

Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264.

Northrop vs. Mercantile Trust Co., 157 Fed. 497.

McElwee vs. Bridgeport Land Co., 54 Fed. 627.

An excellent statement of the rule, covering practically

the situation which we have in the case at bar, is as follows:

> "If a creditor receiving a check is guilty of laches in presenting it, or in giving notice of non-payment, after presentment, and the bank in the meantime suspends payment, he thereby makes it his own, and it operates as payment of his debt; the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."
>
> 21 *Ruling Case Law*, "*Payment*," Sec. 65, Page 66.

See also the following authorities:

Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37.

Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934.

Brown v. Cox, 202 Iowa 1244, 211 N. W. 890.

Campbell vs. Shark, 46 Idaho 278, 267 Pac. 459.

Quarles vs. Taylor & Co., 196 N. C. 313, 142 S. E. 25.

A check drawn on a bank and given to that bank in payment of a sight draft is a payment in cash, although no currency or greenbacks or gold or silver actually change hands (*Andrew vs. Hartley State Bank*, Iowa, 1928, 219 N. W. 929). This is true, although a bill of lading is attached and the freight charges thereon must be paid in order to get the goods (*Messenger vs. Carroll Trust and Savings Bank*, 193 Iowa 608, 1922, 187 N. W. 545). As the court said in the case last cited:

> "* * * this method of collection was the full equivalent of the payment of money. * * * We deem it clear that the net result of the transaction of payment by the Swaney Company and the receipt thereof by the collecting bank was the same as though the Swaney Company had drawn the currency into its own hands by means

of check, and had thereupon delivered the same to the collecting bank in payment of the sight draft. Such is the holding of the cited cases."

(*Messenger vs. Carroll Trust & Savings Bank*, 193 Iowa 608, 1922, 187 N. W. 545.)

The rule is that the check is the mechanism or means by which the money is remitted and paid, thus avoiding the inconvenience of going to the bank each time and obtaining a large roll of greenbacks or a heavy sack of silver or gold. The respondent railroad company in this case contends that that mechanism or means cannot be used, that in every case wherein freight charges are concerned the shipper must himself go to the bank and obtain the roll of bills or the sacks of silver and gold and convey them to the agent of the carrier. But the authorities are to the contrary. See, among others, the following:

Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A. Fifth Circuit, 1903).

Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (Dist. Ct., Miss., 1914).

Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742.

Palmer vs. Golden, 127 N. Y. Misc. 187, 216 N. Y. S. 509.

Abeles vs. Garlick, 101 N. J. E. 180, 137 Atl. 853.

In *Montgomery County vs. Cochran*, 121 Fed. 17, an Act of the Legislature of Alabama provided for the issuance and sale of certain county road bonds, and that "the proceeds of said bonds shall be paid over to and kept by the treasurer of said county" and he shall be "responsible for the safekeeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer."

Cochran, as county treasurer, by one Kohn, his agent, who was in the employ of a banking house, gave the county board a receipt for $111,109.58, proceeds of the bonds, they were immediately sold, and Kohn took therefor the check of the banking house, Josiah Morris & Co., for that amount. He indorsed the check in the name of the county treasurer, made out a deposit slip and deposited the check in the bank to the credit of the county treasurer, Cochran. No money actually passed as between the purchaser of the bonds and the county treasurer. Seventeen days later, the bank closed its doors, and this action was brought against the county treasurer and his bondsman to recover the proceeds on the ground that the treasurer had failed to keep them safely. The defense was that there were in fact no proceeds, because the treasurer had no right to receive anything but coin or bank bills in payment for the bonds, and therefore, that there was no legal payment for them by means of the check. The court held that this contention was unsound, in trenchant language directly applicable to the construction of the ruling upon which respondent herein lays so much stress:

> "Was it the intention of the Legislature that no transactions with the board of revenue and the purchaser of the bonds and the treasurer should be permitted except by the use of coin or bank bills? The statute must be construed in the light of commercial usage and common knowledge of business transactions. The word 'money,' when used as in this statute, does not mean only coin and bank bills. 'Such a construction,' said Lyon, C. J., in *State vs. McFetridge*, 84 Wis. 473, 515, 54 N. W. 1, 10, 998, 20 L. R. A. 223, 'would be extremely technical, and is, we think, uncalled for. "Money" is a generic term and may mean not only legal tender coin and currency, but also any other circulating medium, or any instru-

ments or tokens in general use in the commercial world as the representatives of value.' And it was held that a certificate of deposit was money within the meaning of a statute. In *Taylor vs. Robinson* (D. C.), 34 Fed. 681, Judge McCormick said: 'The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term "land" designates all real estate.' In *Allibone vs. Ames*, 9 S. D. 74, 81, 68 N. W. 165, 167, 33 L. R. A. 585, the court applies this definition to a certificate of deposit: 'When the certificate of deposit was delivered to plaintiff, and accepted by him, it had all the characteristics of money. Its return to the bank must be regarded as a deposit of that amount of currency. It was, the parties so treating it, precisely the same as if the treasurer had received the coin and again deposited it. To say that if a person deposits a draft or certificate of deposit with a bank, and receives credit for the amount of it, he does not make a deposit of that amount, is simply absurd, in view of the modern methods of transacting business.'

"And there are other authorities to the same effect, showing that the words 'funds or money' and 'proceeds of sale,' as used in the act, should not be confined in their meaning to coin and bank bills. *State vs. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom vs. Brandreth*, 16 L. R. Eq. Cases, 175; *State vs. Hill*, 47 Neb. 456, 66 N. W. 541; *People vs. McKinney*, 10 Mich. 55; *Bork vs. People*, 16 Hun, 476.

"The use of checks, certificates of deposit, and other commercial instruments is so universal and so essential in large transactions that we cannot assume that the Legislature of Alabama meant to forbid their use in the

negotiation and sale of the bonds. If Josiah Morris & Co. had had the coin on hand to pay for the bonds in question, the transaction would have been conducted by the use of checks or certificates of deposit, and we think without any violation of the terms of the statute. If silver coin had been in bank as the basis of the transaction, its weight (about 6,456 pounds) would have made the use of checks or certificates necessary to conveniently complete the transaction. We think, therefore, that checks or certificates of deposit received in good faith by the board of revenue, and delivered to the treasurer, or delivered by direction of the board of revenue to the treasurer, would be 'funds or money' or the 'proceeds of sale' of the bonds in the hands of the treasurer. The check for the price of the bonds in the hands of the treasurer, he having receipted for the same as money, was 'funds or money' in his hands, within the meaning of the statute. * * *"

Per *Shelby*, Cir. J., *Montgomery County vs. Cochran*, 121 Fed. 17, 21-22.

If this reasoning of the Circuit Court of Appeals of the Fifth Circuit is correct, and we have every reason to believe that it is, there is no basis whatever for respondent's contention, upon the soundness of which its whole case rests, to the effect that the Interstate Commerce Commission ruling requires payment of freight bills in gold or silver coin or greenbacks. So technical and narrow a definition of the term money is unsound and unauthorized, and is wholly unsuited to and out of touch with the current of modern commercial life.

CONCLUSION.

We therefore submit that the Circuit Court of Appeals for the Eighth Circuit instead of affirming the judgment of the District Court should have reversed the same and remanded the case to the District Court with directions to enter judgment in favor of petitioner, and that in consequence the judgment entered by the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

STANLEY S. GILLAM,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR PETITIONER.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT SHOULD BE REVERSED.

The judgment of the Circuit Court of Appeals for the Eighth Circuit in this case is contrary to well settled rules of law applicable to negotiable instruments and defining the duty of a holder of a check received in payment of an indebtedness to make prompt presentment thereof for payment to the bank upon which it is drawn. The judgment is likewise contrary to the well settled practice under Minnesota statutes, of allowing counter-claims arising out of or connected with the subject-matter of an action to be pleaded by way of set-off, reducing or cancelling the amount of re-

covery. The decisions below are in conflict with the recent ruling of this Court in *Chicago & North Western Railway Company vs. Lindell*, 281 U. S. 14, decided February 24, 1930. Their reasoning takes certain provisions of the Interstate Commerce Act and it's amendments, and a ruling of the Interstate Commerce Commission thereunder designed to prevent unfair discrimination or favoritism in transportation charges, out of their proper setting, and so applies these provisions as to completely abrogate and nullify the force and effect of well-settled rules of law otherwise clearly applicable to protect petitioner from the asserted liability. The effect of that reasoning is to immunize respondent from any responsibility for the adverse effects of its own negligent acts. It is our position that there is no necessity, logical or practical, for such an application of the provisions of the Interstate Commerce Act, and that such an abrogation of salutary rules of general law is unwarranted.

OFFICIAL REPORT OF OPINION IN THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in *Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 36 Fed. (2d) 180.

The opinion of the District Court, Charles A. Dewey, Judge, is not reported, but is printed at pages 12-14 of the Record.

STATEMENT AS TO JURISDICTION.

Statement of the grounds of this Court's jurisdiction is made at pages 23-24 of our brief in support of Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

The case comes to this Court on Petition for Writ of Certiorari, filed February 14, 1930, directed to the judgment of the Circuit Court of Appeals for the Eighth Circuit (R. 84), rendered November 15, 1929, in favor of respondent, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and against petitioner, Fullerton Lumber Company, affirming the judgment of the District Court.

Certiorari was granted March 17, 1930 (R. 84).

The judgment of the District Court (R. 14) allowed recovery of the full amount sued for, $375.96, plus interest and costs. That judgment was entered on November 22, 1928, in an action at law tried before Honorable Charles A. Dewey, Judge, at St. Paul, Minnesota, on November 13, 1928.

The action was brought by the receivers of the Chicago, Milwaukee & St. Paul Railway Company to recover a freight charge of $375.96 alleged to be due for transporting a carload of coal from Norfolk, West Virginia, to Kimball, South Dakota, containing 104,000 pounds of coal and consigned to the Fullerton Lumber Company at Kimball (R. 1-4). The car was loaded in West Virginia, on June 9, 1926, and delivered at Kimball on June 16, 1926 (R. 16). The complaint alleged that the coal was duly transported and delivered and that no part of the freight charge had been paid.

The answer (R. 4) denied that the coal was duly transported, alleged that the carriage was negligent causing loss and damage which was paid for by the respondent, and then went on to deny that petitioner was indebted to respondent in any sum whatsoever, alleging that before the action was brought petitioner fully paid and satisfied and discharged the claim for freight alleged in the complaint, less a deduction on account of improper carriage.

The reply (R. 7) took issue with petitioner's allegation of payment, by alleging in detail that on Saturday afternoon, June 19, 1926, petitioner's agent at Kimball, South Dakota, delivered to respondent's agent at the same place petitioner's check No. 738, dated June 19, 1926, for the sum of $375.96, payable to respondent; that this check was duly presented to the Lumbard State Bank of Kimball, the bank upon which it was drawn, and the bank refused payment thereof. The reply further stated that respondent had never received any money on the check.

At the trial the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, was substituted as party plaintiff (R. 10).

A stipulation was entered into waiving jury trial (R. 9-10), and the case duly came on for trial before Judge Dewey, without a jury. Forest T. Gustafson, the Milwaukee agent at Kimball, was called by respondent as its first witness (R. 16), and he testified to the shipment, that the car was delivered at the Fullerton Lumber Company yard at Kimball on June 17, 1926, and unloaded on the 19th, that he presented the freight bill for payment between the hours of two and three in the afternoon of June 19, 1926, to Mr. Yarosh, the Fullerton agent at Kimball, that Yarosh paid it by giving a Fullerton Lumber Company check for $375.96 upon the Lumbard State Bank of Kimball, and that he thereupon receipted the freight bill as paid and gave it to Yarosh (R. 17).

Instead of presenting the check for payment at the bank upon which it was drawn, at Kimball, on that same day, or before the close of business on the next business day, Monday, June 21st, the Railway Company's agent, Gustafson, sent the check by express, with other collections, on the eastbound 10:35 Sunday morning Milwaukee train, on June 20th, 1926, to Chicago for deposit. The check was not presented

for payment at the Lumbard State Bank of Kimball, the bank upon which it was drawn, until June 28, 1926, nine days after it had been delivered to the Railway Company's agent (R. 38, 55), and it was not honored by the bank, although at all times the Fullerton Lumber Company had on deposit sufficient funds to cover it (R. 38), for the reason that about noon on Friday, June 25, 1926, the bank closed its doors (R. 26). (In its brief in the Circuit Court of Appeals respondent asserted that the record did not show that June 28 was the date of presentment. But when the check, Exhibit C, was put in evidence by respondent it had attached to it the bank slip showing presentment and refusal on the 28th, as we recall it; and, at all events, it was after the bank closed on Friday noon of June 25; the next day, the 26th, was Saturday, the 27th was Sunday. Yarosh was first notified June 29 (R. 38).) If Mr. Gustafson, the Milwaukee agent, had immediately obtained from the bank the currency called for by the check, or if the bank had not closed its doors, the check would have been paid when it arrived and the controversy involved in this litigation would not have arisen. It does arise out of the circumstances by reason of which the currency or cash called for by the check was not obtained, after the check for the proper amount of money was delivered into the keeping of the Milwaukee Railway and its agent, and involves the question whether the Railway Company can escape responsibility for the negligent manner in which it handled the check after it received it on the ground that, being a common carrier, it is freed from the ordinary and usual responsibilities of individuals in a like situation. It is not denied that an individual is under the duty of presenting the check for payment on the same or next succeeding business day, but the railroad contends that a ruling of the Interstate Commerce Commission protects it from the

effect of the rules of law which ordinarily govern such a situation.

John Dickie, treasurer of the Milwaukee at Chicago, was the only other witness who testified on behalf of respondent (R. 30), and he stated that on June 16, 1926, three days before the check was delivered in payment of the freight bill, he had instructed Mr. Gustafson, as local agent at Kimball, to send checks drawn upon local banks there to the Central Trust Company of Illinois at Chicago for deposit (R. 28, 73, 33).

Mr. Yarosh, the Fullerton agent at Kimball, testified on behalf of petitioner that for a long time prior to June 19, 1926, he had, as a uniform practice, paid all freight bills owed to the Milwaukee by check on the Lumbard Bank of Kimball, that these checks had always been indorsed by Gustafson and presented for payment by Mr. Gustafson on the same or next succeeding business day, and that, on the occasion in question, he had had no notice from Mr. Gustafson that the check was to be handled in any different manner (R. 37, 39-40).

It is clear that all parties agreed and understood that the freight bill was paid when the check was delivered. Mr. Gustafson receipted the bill (R. 17-18), and some months later the Milwaukee confirmed this understanding by honoring and paying a claim for refund of a portion of the amount thus paid by giving its draft to the Fullerton Lumber Company for $4.26 (R. 35-36), which draft was paid. This draft was a refund of a portion of the sum of $375.96 previously paid by delivery of the check involved in this controversy.

There was practically no dispute in the testimony in any material particulars.

After hearing the testimony and considering various items of documentary evidence and exhibits in connection therewith, together with the arguments of counsel, Judge Dewey

rendered his decision (R. 12-14), finding in respondent's favor and requiring petitioner to pay the freight bill over again, on the ground that an Interstate Commerce Commission ruling, specifying that nothing but money can be lawfully received in payment of freight, precluded the railroad company from accepting the check and therefore the carrier was not bound by the ordinary rule requiring due diligence in presenting a check for payment (R. 14). The trial court reached this decision with reluctance, recognizing the Railway Company's negligence in dealing with the check, and made the decision expressly reserving to petitioner the right to bring a separate action against respondent for the loss resulting from failure of the railroad company to present the check for payment within a reasonable time (R. 14).

After entry of judgment, petitioner made a motion for amended findings or a new trial and for leave to file a counter-claim for damages for negligence in not properly presenting the check for payment (R. 53), and Judge Dewey made an order thereon sustaining the motion for amended findings in part (R. 55), but denying a new trial, and denying the motion for leave to file a counter-claim. The original findings stated that both parties knew the Lumbard State Bank of Kimball was not in the best of financial circumstances at the time of the execution of the check (R. 13), whereas there is nothing in the evidence to indicate that petitioner had any such knowledge, in fact the testimony shows conclusively that petitioner kept its funds on deposit there up to the hour of closing and dealt with it on the basis of full confidence (R. 38, 42, 45). Upon the motion for amended findings, the trial court changed his findings to read that respondent (instead of "both parties") was aware that the Lumbard bank was not in good financial circumstances at the time the check was given (R. 55).

The essence of the case is this: The Fullerton Lumber Company did its part by giving the Railway Company full power to get the currency; the Railway Company undertook to get it; the sole reason for its failure to obtain the currency was failure of the Railway Company to carry out this undertaking. Can the Railway Company now take advantage of its own wrong? Can it escape the normal consequences of such wrong by resort to an Interstate Commerce Commission ruling which does not in terms give such an immunity but which only, in terms and in intent, protects the public against discrimination?

Or, to put it more briefly, is there a privilege surrounding the operations of the carrier corporation in such a situation, which exempts it from the obligations of the common law, and of the Law Merchant, governing the actions of ordinary persons?

CONTENTIONS OF PETITIONER.

Petitioner insists:

(1) That the Court should have entered judgment in favor of petitioner, that respondent take nothing by its action, and for costs and disbursements.

(2) That when the carrier's agent took the check, it was thereafter within his power to obtain the currency upon it, and that thereafter it was not within the power of the Fullerton Company's agent to deal with or obtain currency upon the check.

(3) That after taking the check it was the duty of the carrier's agent to go directly to the bank and obtain currency upon it.

(4) That, by reason of his failure to do this and of his affirmative act in sending the check on a nine days' journey

to Chicago, he, and he alone, prevented the act of making and delivering the check from successfully resulting in the transfer of greenbacks or gold from the Fullerton Company to the railroad.

(5) That there is nothing in Paragraph 7 of Section 6 of the Interstate Commerce Act (U. S. Code, Tit. 49, Sec. 6, Paragraph 7, 49 U. S. C. A., Sec. 6 (7)), which affects the question; or which relieves the carrier from the necessary consequences of its own acts.

(6) That Interstate Commerce Commission Conference Ruling No. 207, providing that freight bills shall be paid in money, does not govern the case.

(7) That there is no Federal law precluding the use of checks as a mechanism for remitting money, nor abrogating the responsibilities of a holder of a check as determined by common and statute law.

(8) That there is no Federal law providing in terms or by implication that freight bills can only be paid by the immediate transfer of greenbacks, gold or silver.

(9) That to deny the right of counter-claim to petitioner, to be asserted in this action, greatly prejudices petitioner, and in substance allows respondent recovery on a cause of action which could not exist apart from respondent's own wrong. In any separate action to recover damages for that wrong, the evidence would be identical with the evidence in the case at bar.

(10) That the authorities cited in the opinions of the courts in this case opposing allowance of counter-claim do not involve the kind of counter-claim presented in the case at bar.

SPECIFICATIONS OF ERROR.

Petitioner urges all of the assignments of error and will argue and rely upon all of them in this brief. Said assignments of error are as follows:

Petitioner complains that the following errors were committed by the United States Circuit Court of Appeals for the Eighth Circuit:

(1) The Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court and in entering its judgment, dated November 15, 1929, to that effect, said judgment of the District Court so affirmed being as follows:

> "It is therefore the judgment and order of the Court that the plaintiff have and recover as against the defendant a judgment in the sum of $375.96, with interest thereon at six per cent from June 25, 1926, and costs of this suit. To all of which plaintiff excepts" (R. 14, 84).

(2) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the respondent was entitled to recover the amount claimed in the summons and complaint herein (R. 84).

(3) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the evidence and facts found by the District Court compelled the judgment (R. 83).

(4) The Circuit Court of Appeals for the Eighth Circuit erred in approving the conclusions stated by the trial court in its opinion, as quoted in the opinion of the Circuit Court of Appeals (R. 80).

(5) The Circuit Court of Appeals for the Eighth Cir-

cuit erred in approving the following finding of the District Court:

> "The foregoing rule of the Interstate Commerce Commission (referring to Interstate Commerce Commission Conference Ruling 207) has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. *. L. & N. Ry. Co. vs. U. S.*, 219 U. S. 468; *N. Y. C. & H. R. R. Co. vs. Gray*, 239 U. S. 583; *Eggleston vs. Plowman* (S. D.), 207 N. W. 981" (R. 14, 80-81).

(6) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for amended findings (R. 83), which motion came on to be heard on February 2, 1929, and which denial by the District Court was as follows:

> "In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied and the Court adheres to its views as set forth in said findings and decision, dated November 20, 1928, that said freight bill was not legally paid by said check therein referred to" (R. 55).

(7) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for a new trial of said action as set forth in the motion papers, dated January 5, 1929, which motion came on to be heard on February 2, 1929, and the Court should have reversed the ruling of the District Court and should have ordered the granting of petitioner's motion for a new trial on the ground that the findings, judgment, decision

and order of said District Court, filed November 22, 1928, are not justified by the evidence and are contrary to law (see R. 53, 55, 80, 83).

(8) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the ruling of the District Court denying petitioner's motion to amend its answer so as to include therein a counter-claim for damages for respondent's negligence in not properly dealing with or presenting for payment the check involved in said action, and the Circuit Court of Appeals for the Eighth Circuit erred in not vacating and annulling the judgment of the District Court and in not ordering the granting of a new trial upon said issues of negligence and damage, to the end that the damage caused to petitioner by the negligence of respondent, arising out of the same transaction, might be determined and set off against any amount which might be found to be due to respondent upon said freight bill, if the theory of the decision of the District Court be approved; that the evidence introduced upon the issues in this action conclusively showed said negligence and damages and the reservation and qualification stated by the District Court in paragraph twelve (next to last paragraph, R. 14) of its said decision, dated November 20, 1928, and filed November 22, 1928, does not adequately protect petitioner's rights to litigate said question of negligence and damages and a just decision of this cause requires more effective and adequate safeguard of the right to litigate said question of negligence and damages if the decision that said freight bill was not paid be adhered to; that a separate action for damages as allowed in the decision of said District Court and as affirmed by the decision of said Circuit Court of Appeals would not be effective to protect petitioner's rights in the premises (see R. 54, 14, 83).

SUMMARY OF THE ARGUMENT.

I.

The Check Was Delivered and Accepted in Full and Final Payment of the Freight Bill.

"Payment" implies a discharge of an indebtedness according to its terms.

Morgan Paving Co. vs. Carroll, 211 Ala. 121, 99 So. 640.

Bartholomew vs. Emerson-Brantingham Implement Co., 68 Colo. 244, 187 Pac. 538.

And is a matter determined by the intention or agreement of the parties.

Luckenbach vs. McCahan Sugar Refining Co., 248 U. S. 139, 149.

Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (D. C. N. D. Miss., 1914, Niles, J.).

48 *Corpus Juris*, 585-587.

Here the parties' conduct on the afternoon of June 19, 1926, clearly evidences an agreement that the matter of payment was then finally concluded.

II.

The Railroad Company Treated the Freight Bill as Paid.

Out of the sum of $375.96 paid only by this check, the railroad company refunded $4.26 by means of a draft which was duly honored. There could not lawfully be a refund of an overpayment unless overpayment was first actually consummated.

Davis vs. Mobile R. Co., 194 Fed. 374 (C. C. A.—Fifth Circ., 1912).

10 *Corpus Juris*, 454, Sec. 718.

III.

THE LONG CONTINUED PRIOR CONDUCT OF THE RAILROAD COMPANY WAS TO ACCEPT CHECKS IN FULL PAYMENT OF FREIGHT BILLS.

For more than a year and a half prior to June 19, 1926, and in scores of instances, every Fullerton freight bill at Kimball had been paid by check. Every one of these checks had been presented by the railway's agent for payment at the bank at Kimball on the same or next business day. The Fullerton Company had a right to expect that the check given on June 19 would be handled the same way.

IV.

THE SOLE CAUSE OF THE FAILURE OF THE RAILROAD COMPANY TO OBTAIN CURRENCY ON THE CHECK WAS ITS OWN NEGLIGENCE, ITS DISREGARD OF THE DUTY OF PROMPT PRESENTATION WHICH IT OWED TO THE FULLERTON COMPANY AS DRAWER THEREOF.

A party to a contract cannot recover for a loss caused by his own act, representation, or omission.

Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264.

Northrop vs. Mercantile Trust Co., 157 Fed. 497 (C. C. A. 4th Circ., 1907).

McElwee vs. Bridgeport Land Co., 54 Fed. 627 (C. C. A. 5th Circ., 1893).

Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300.

Barton vs. Gray, 57 Mich. 622, 24 N. W. 638.

13 *Corpus Juris*, 647.

This rule applies to a common carrier railroad seeking to collect freight charges.

Davis vs. Akron Feed & Milling Company, 296 Fed. 675 (C. C. A.—6th Circ. 1924).

And it applies irrespective of the fact that the carrier seeking to collect is the last carrier acting as agent of prior ones.

Davis vs. Akron Feed & Milling Company, 296 Fed. 675 (C. C. A.—6th Circ. 1924).

V.

Under the Circumstances Disclosed in the Case at Bar, It Is Settled Law That the Check Was Accepted in Unconditional Payment.

Respondent may argue that a check is conditional payment only, dependent upon whether it ultimately is honored.

See 21 *Ruling Case Law*, pages 60-62.

Manitoba Mortgage Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542, and cases cited at page 87 of 114 Minn.

But this rule only applies where prompt and proper presentation for payment has been made. Where the failure to obtain currency or its equivalent upon the check is due to the laches of the payee in not promptly and properly presenting the check to the drawee bank for payment, the check is absolute and unconditional payment; the creditor is deemed to have received the currency which, but for his wrong, he would have received.

Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37 (1904).

21 *Ruling Case Law*, pages 66-67, and cases cited.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542.

Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934.

Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891.

Campbell vs. Shark, 46 Idaho 278, 267 Pac. 458.

Illustration: *Quarles vs. Taylor & Company*, 195 N. C. 313, 142 S. E. 25:

> A creditor in a nearby town received a check drawn on the Bank of Whitakers in payment of a debt. He deposited it for collection in his own bank, which forwarded it to the Bank of Whitakers. When it arrived, the Bank of Whitakers charged it to the drawer's account and forwarded a draft for the proceeds. Before the draft arrived, the Bank of Whitakers closed its doors. *Held*, the check was paid.

Where the payee is guilty of laches in presenting a check for payment, and the drawee bank in the meantime suspends payment, the check operates as payment of the debt.

21 *Ruling Case Law*, "*Payment*," Sec. 65, page 66.

Taylor vs. Wilson, 11 Metcalf (Mass.) 44, 45 Am. Dec. 180.

Federal Land Bank vs. Barrow, 189 N. C. 303, 127 S. E. 3.

Lloyd Mortgage Co. vs. Davis, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465, and note, 36 A. L. R. 471.

Kirkpatrick vs. Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

Nuzum vs. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024.

VI.

THE CONSTITUTIONAL IMMUNITY OF SOVEREIGN STATES DOES NOT COVER A RAILROAD: EGGLESTON VS. PLOWMAN DOES NOT APPLY.

The District Court and the Circuit Court of Appeals for the Eighth Circuit placed great weight on a South Dakota case which held that where a taxpayer sent a draft drawn by a nearby bank to a county treasurer in payment of a real estate tax and the county treasurer delayed three weeks in presenting the draft for payment and it was dishonored, mandamus would not issue for issuance of a tax receipt; the county was not chargeable with the treasurer's negligence.

Eggleston vs. Plowman, 49 S. D. 609, 207 N. W. 981.

That case was in essence an attempt to sue a sovereign state. Under the Eleventh Amendment to the United States Constitution, such a suit could not be brought.

United States Constitution, Eleventh Amendment.
Railroad Company vs. Tennessee, 101 U. S. 337.
Railroad Company vs. Alabama, 101 U. S. 832.
Duhne vs. New Jersey, 251 U. S. 311.
I *Cooley, Constitutional Limitations*, 8th Ed., pages 21-24, and cases cited.

A sovereign state cannot be sued in its own courts.

25 *Ruling Case Law*, page 413.
Railroad Company vs. Tennessee, 101 U. S. 337.
Railroad Company vs. Alabama, 101 U. S. 832.
Fitts vs. McGhee, 172 U. S. 516.
Smith vs. Reeves, 178 U. S. 436.
Palmer vs. Ohio, 248 U. S. 32.
Ex Parte State of New York, 256 U. S. 490.

Hampton vs. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A. L. R. 1456, note.

Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424.

State vs. Field, 27 N. M. 384, 201 Pac. 1059.

Looney vs. Stryker, 31 N. M. 557, 249 Pac. 112, 50 A. L. R. 1404, note.

White Eagle Oil, etc., Co. vs. Gunderson, 48 S. D. 608, 205 N. W. 614, 43 A. L. R. 397, note.

A state is not liable for the negligent acts of its agents unless, through the legislative department, it assumes such liability.

Murdock Parlor Grate Co. vs. Commonwealth, 152 Mass. 28, 24 N. E. 854.

Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424.

Lewis vs. State, 96 N. Y. 71.

Clodfelter vs. State, 86 N. C. 51.

Billings vs. State, 27 Wash. 288, 67 Pac. 583.

36 *Cyc.* 881.

VII.

THE DEVICE WHICH THE RAILWAY COMPANY SEEKS TO USE TO PREVENT THE GENERAL RULES OF LAW APPLICABLE TO OTHERS FROM GOVERNING ITS OWN CONDUCT AND TO ESCAPE RESPONSIBILITY FOR THE CONSEQUENCES OF ITS OWN ACTS IS THE INTERSTATE COMMERCE COMMISSION RULING REGARDING FREIGHT CHARGES AND AN ATTEMPTED EXTENSION OF THE RULE OF LAW THAT FREIGHT BILLS CANNOT BE COMPROMISED BY DELIVERY OF SOMETHING OF UNCERTAIN VALUE. THAT RULING AND THAT RULE OF LAW DO NOT GOVERN THIS CASE.

Interstate Commerce Act, Title 49, U. S. C., Sec. 6, Par. 7.

Interstate Commerce Commission Conference Ruling No. 207, adopted September 15, 1906.

Davis vs. Akron Feed & Milling Co., 296 Fed. 675, 677-678 (C. C. A.—6th Circ. 1924).

Pennsylvania R. Co. vs. Olivit Brothers, 243 U. S. 574.

Paragraph 7 of Section 6 of the Interstate Commerce Act (49 U. S. C.), and Conference Ruling Number 207 of the Interstate Commerce Commission (adopted September 15, 1906), are directed at unfair discrimination in the collection of transportation charges. "The acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules" is precluded.

Louisville & Nashville Railway Company vs. Mottley, 219 U. S. 467.

Chicago, Indianapolis and Louisville Railway Company vs. United States, 219 U. S. 486.

New York Central & Hudson River Railroad Company vs. Gray, 239 U. S. 583.

But none of these statutory provisions or decisions precludes the payment of money for transportation charges by means of checks. They do not deal with the question whether a check is a proper mechanism to use to remit money in payment of freight charges.

The use of checks to remit money is well-nigh universal among business men.

City of El Paso vs. Two Republics Life Insurance Company, Texas Civil Appeals, 1926, 278 S. W. 231.

A check drawn on a bank and delivered to that bank in discharge of an obligation is a payment in cash, although no currency, greenbacks, gold or silver actually change hands.

Andrew vs. Hartley State Bank, 207 Iowa 407, 219 N. W. 929 (1928).

Messenger vs. Carroll Trust and Savings Bank, 193 Iowa 608, 187 N. W. 545 (1922).

Payment of cash, of money, may be made by check, and it is not necessary to have greenbacks or gold or silver change hands in order to consummate a payment of money.

Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A.—Fifth Circuit, 1903).

Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (Dist. Ct. Miss., 1914).

Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742 (1927).

Palmer vs. Golden, 127 N. Y. Misc. 487, 216 N. Y. S. 509.

Abeles vs. Guelick, 101 N. J. E. 180, 137 Atl. 856 (1927).

VIII.

ADOPTION OF RESPONDENT'S VIEWS WOULD ANNUL THE LAW MERCHANT AND RESULT IN GREAT INCONVENIENCE IN THE TRANSACTION OF MODERN BUSINESS.

The general body of commercial usages in matters relative to commerce constitute a part of the law of the land; this is a developing, living law of which the courts take judicial notice.

Bouvier, Law Dictionary, 3rd Ed., page 1882.

IX.

THE WORDS ON THE CHECK "COLLECTIBLE AT PAR THROUGH FEDERAL RESERVE BANK AT MINNEAPOLIS" ARE NO JUSTIFICATION FOR RESPONDENT'S FAILURE TO PROMPTLY PRESENT THE CHECK FOR PAYMENT.

Spokane Valley State Bank vs. Lutes, 133 Wash. 66, 233 Pac. 308.

Circular No. 35, June 15, 1916, Federal Reserve Bank of Minneapolis.

Circular No. 193, Jan. 15, 1920, Federal Reserve Bank of Minneapolis.

Circular No. 227, Oct. 1, 1920, Federal Reserve Bank of Minneapolis.

Circular No. 245, April 1, 1921, Federal Reserve Bank of Minneapolis.

Circular No. 358, Jan. 1, 1927, Federal Reserve Bank of Minneapolis.

X.

THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT LEAVE TO INTERPOSE IN THIS ACTION COUNTER-CLAIM FOR THE LOSS CAUSED BY RESPONDENT'S WRONGFUL ACTS.

Cases permitting counter-claim:

Chicago & North Western Railway Company vs. Lindell, 281 U. S. 814.

C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp., 26 F. (2d) 90 (Dist. Ct. Minn., Judge John B. Sanborn).

Payne vs. Clarke, 271 Fed. 525 (D. C. S. D. Calif., Judge Bledsoe).

C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co., 262 Fed. 71 (D. C. E. D. Wis., Judge Geiger).

Wells Fargo & Co. vs. Cunco, 241 Fed. 727 (D. C. S. D. N. Y., Judge Mayer).

Central of Georgia Ry. Co. vs. Birmingham Sand & Brick Co., 9 Ala. App. 419.

Battle vs. Atkinson, 9 Ga. App. 488.

Penn. R. Co. vs. Bellinger, 101 N. Y. Misc. Rep. 105.

N. Y. Central R. Co. vs. Federal Sugar Co., 201 N. Y. App. Div. 467.

Nashville, C. & St. L. Ry. vs. Tennessee Mill Co., 143 Tenn. 237.

Cases denying counter-claim:

Michigan Central R. Co. vs. Piowaty, 36 F. (2d) 604 (D. C. N. D. Ill., Judge Woodward).

Fullerton Lumber Co. vs. Chicago, M. St. P. & P. R. R. Co., 36 F. (2d) 180 (C. C. A.—8th Circuit, Judge Woodrough).

Pennsylvania R. Co. vs. South Carolina Produce Ass'n,

25 F. (2d) 315 (D. C. E. D. South Carolina, Judge Cochran).

Johnson-Brown Co. vs. Railroad, 239 Fed. 590 (D. C. S. D. Georgia, Judge Speer).

C. & N. W. Ry. Co. vs. Stein Co., 233 Fed. 716 (D. C. Neb., Judge Munger).

Illinois Central R. Co. vs. Hoopes, 233 Fed. 135 (D. C. S. D. Iowa, Judge Wade).

D. L. & W. R. R. Co. vs. Nuhs Co., 93 N. J. Law 309.

Adams Express Co. vs. Albright Bros., 75 Pa. Super. Ct. 410.

XI.

THE DICTATES OF SUBSTANTIAL JUSTICE AND FAIR DEALING REQUIRE A DECISION IN PETITIONER'S FAVOR.

ARGUMENT.

I.

THE CHECK WAS DELIVERED AND ACCEPTED IN FULL AND FINAL PAYMENT OF THE FREIGHT BILL.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The car of coal was placed on the siding for unloading near the Fullerton coal warehouse on the afternoon of June 17, 1926 (R. 17). On Saturday, June 19, early in the afternoon, "between two and three o'clock P. M.," according to the railway agent, Gustafson (R. 17), and "around two o'clock," according to the Fullerton agent, Mr. Yarosh (R. 37), Gustafson came over to the lumber yard office with the freight bill and its duplicate, the delivery receipt, and presented it to Yarosh for payment (R. 37), in exactly similar manner as

had been done for former freight bills for more than a year and a half previously (R. 22, 39-40; Exhibits 1 and 2, R. 57-72). Yarosh then and there paid the freight bill by drawing check number 738 of the Fullerton Lumber Company, dated June 19, 1926, on the Lumbard State Bank of Kimball, for $375.96, and immediately delivering it to Gustafson. Yarosh then deducted $375.96 from his bank balance as shown on his stub (R. 45), and Gustafson marked the freight bill "Received payment 6/19/1926, F. T. Gustafson," and delivered it to Yarosh so receipted (Exhibit A, page 56; R. 37, 17).

By this transaction, both parties agreed that the obligation on the freight bill was discharged (R. 18). Gustafson put the check in his cash drawer, treating it as a collection (R. 18). The transaction was fully completed some time prior to 3 P. M., Gustafson returning two blocks to the depot in time to take care of his duties prior to departure of the 3 P. M. westbound train (R. 26). The Lumbard State Bank was about two minutes' walk, two blocks' distance, from the lumber yard office, was open at the time the check was delivered, and did not close for the day until about an hour after the 3 P. M. westbound had left (R. 27). Gustafson never asked Yarosh for cash or currency in payment of freight charges, taking the check in final payment in the same manner as he had done scores of times before (R. 48), and no question as to the finality of the transaction arose so as to come to the attention of Yarosh until, on June 29, 1926, ten days after the check was delivered, he was for the first time notified that the check had not been paid by the bank (R. 38). He immediately went over to the depot to see Gustafson and this conversation, substantially, took place:

"A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes. And Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embarrass the bank. I told him, why didn't he say something, I could have got him the cash from the bank" (R. 38).

Gustafson was recalled, in an effort to overcome this testimony by Yarosh, but he admitted the conversation substantially as Yarosh related it, except that he tried to deny that embarrassment of the bank was given as one reason for sending the check down to Chicago, 660 miles away from Kimball and from the bank on which it was drawn (R. 46-47). The testimony of John Dickie, assistant treasurer of the Railway Company shows, however, that the matter was left much to the discretion of the local agent (R. 32-33; Exhibit 4, page 73), depending upon whether he felt any question about the bank, and this testimony tends to substantiate Yarosh, whose testimony throughout is full, frank and obviously candid and sincere.

No question is, or can be, made in this case as to the authority of the railway agent at Kimball, Mr. Gustafson, to receive the check in payment and receipt the freight bill (see R. 48, 32; Exhibit 4, 73).

"Payment" implies a discharge or extinguishment of the indebtedness or obligation according to its terms (*Morgan Paving Co. vs. Carroll*, 211 Ala. 121, 99 So. 640; *Bartholomew vs. Emerson-Brantingham Implement Co.*, 68 Colo. 244, 187 Pac. 538), and is a matter determined by the intention or agreement of the parties (*Luckenbach vs. McCahan Sugar Refining Co.*, 248 U. S. 139; *Bennett vs. Bank of Commerce and Trust Co.*, 220 Fed. 950; 48 *Corpus Juris* 585-587). In the light of these principles there can be no doubt that the

freight bill in the case at bar was paid. Both parties did in fact intend that the obligation was extinguished simultaneously with delivery and receipt of the check; both parties intended, agreed and understood that the check was a proper and sufficient means to accomplish such extinguishment; both parties intended, agreed and understood that the check stood for and represented, not something of uncertain value like a damage claim, or advertising, or services, but exactly $375.96 in United States currency.

II.

The Railroad Company Treated the Freight Bill as Paid.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

When the check was delivered, the railway's agent, Gustafson, regarded the freight bill as paid (R. 17-18).

In addition, several months later the Fullerton Lumber Company, also continuing to regard the freight bill as paid, filed a claim with the Railway Company demanding the return of $6.51 out of the sum of $375.96 as being an overpayment, due to improper calculation of weight of the coal. After some controversy, the Railway Company admitted the correctness of the position taken by the Fullerton Company, with some modification, and paid back $4.26 of the amount theretofore paid, by sending its draft for that amount to the Fullerton Company (R. 35-36).

Unless the freight bill was theretofore paid, and so regarded by both parties, this conduct on the part of the Railway Company is unintelligible. The shipper had no basis to demand repayment of the overcharge unless the bill had been actually paid, and a complaint in an action for its recovery which failed to allege the prior payment would have been de-

murrable (*Davis vs. Mobile R. Co.*, 194 Fed. 374; 10 *Corpus Juris*, page 454, Sec. 718, and cases cited). The Railway Company could not lawfully have made this repayment of the overcharge, unless the freight bill was paid.

Both under the original agreement at the time the check was delivered and the freight bill receipted, and under the subsequent conduct of the parties relative to this claim of overcharge, the freight bill was paid. The conduct of the Railway Company ratified the acts of its agent Gustafson in accepting the check in full and final payment of the freight bill.

III.

The Long Continued Prior Conduct of the Railroad Company Was to Accept Checks in Full Payment of Freight Bills.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

Mr. Yarosh had been the agent in charge of the Fullerton Lumber Company's yard at Kimball ever since the yard began to be operated by the Fullerton Company, in June of 1922 (R. 37). He had always paid the freight bills by check, such checks had always been accepted by the Railway Company in full and final payment and no question regarding such payment had ever been raised by the Railway Company prior to the case at bar (R. 39-40).

The check in controversy is No. 738 of the Fullerton Company, for $375.96, and it was dated and delivered on June 19, 1926 (Exhibit C, page 56).

Check No. 737, the next preceding one, is also in evidence (Exhibit 1, page 57). This check, for $502.70, was dated and delivered on June 15, 1926, four days earlier, and it likewise was accepted in payment of a freight bill (R. 23-24, 39).

It covered the freight on two cars of coal (R. 39). That check was presented for payment to the Lumbard State Bank of Kimball the same day on which it was drawn and delivered, and it was duly paid on that same day (Exhibit 1, page 57).

Thirty-six prior checks, beginning with number 548, for $147.15, dated and delivered June 11, 1925, to and including number 724, for $2.38, all drawn on the Lumbard State Bank of Kimball by Fullerton Lumber Company and made payable to the Railway Company, and delivered to and accepted by the railway in payment of freight charges, are in evidence (Exhibit 2, pages 57-72). These checks cover all of the transactions between the Railway Company and the Fullerton Company for more than a year prior to June 19, 1926. In not one of these transactions was any question ever raised by the Railway Company as to the manner of payment; ever since 1922 this was the manner and medium by which freight charges were paid, in these transactions between these two parties, and never at any time did the Railway Company raise any question as to the propriety of this method of payment (R. 39-40). It is the common and the usual manner of payment under modern business conditions.

The 37 prior checks thus introduced in evidence in this case are well worth careful study. The Court will find, upon inspection of the originals, that every one of these checks was presented by Gustafson for payment at the bank, either on the same day as its date or, at most, on the next succeeding business day, as the law requires (R. 25). During all of the time during which the parties involved in this controversy had business transactions between them at Kimball, no check of the Fullerton Lumber Company had been sent away down to Chicago by Gustafson, prior to June 19, 1926 (Gustafson, R. 24). In all previous cases, Gustafson

presented the checks for payment to the bank at Kimball within twenty-four hours (R. 25). This conduct shows, as we think conclusively, that Gustafson and the Railway Company knew fully their obligation and duty to make prompt presentation for payment of these checks accepted by them in payment of freight charges. So long as there was such prompt presentation, no difficulty over this method of payment ever arose. The Fullerton Company had a right to expect that the check given on June 19, 1926, would be handled in the same manner. As these checks, stamped duly paid by the Lumbard State Bank, came back to Mr. Yarosh with each monthly statement, they showed on their faces that they had been properly and promptly presented to the bank on which they were drawn for payment and were duly honored and paid. Yarosh first learned that the check in controversy had not been honored on June 29, 1926, ten days after its delivery (R. 38). Prior to that date, for a period running back to 1922, he never had had any notice that Gustafson was sending these checks down to Chicago. In fact, Gustafson never did send them to Chicago, until he so disposed of the check here in controversy (R. 24).

IV.

THE SOLE CAUSE OF THE FAILURE OF THE RAILROAD COMPANY TO OBTAIN CURRENCY ON THE CHECK WAS ITS OWN NEGLIGENCE, ITS DISREGARD OF THE DUTY OF PROMPT PRESENTATION, WHICH IT OWED TO THE FULLERTON COMPANY AS DRAWER THEREOF.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

No question that the check represented $375.96 in United States currency could ever have arisen but for one thing: the

wrongful act, the plain neglect, of the Railway Company in failing and refusing to carry out its undertaking to go to the Lumbard bank and obtain the greenbacks on the check, not later than 4 P. M. of Monday, June 21, 1926, and, instead, in sending the check 660 miles down to Chicago, nearly twenty-four hours' journey by train, and around Robin Hood's barn for more than a week, thus placing upon the drawer, the Fullerton Lumber Company, a risk which it never assumed and never intended to assume and against which risk the Railway Company was bound to protect its shipper, the drawer of the check, by prompt presentation as the law requires. Had the Railway Company continued its failure to present the check for no longer a period than the forenoon of the sixth day after its delivery, the consequences of the risk to which its conduct subjected the Fullerton Company could have been escaped, but when such neglect was continued beyond that time it was too much, and disaster came.

Now, in the case at bar, the Railway Company, in the position of the aggressor, comes into this Court asking for court help to shift onto the Fullerton Company the consequences solely due to such neglect. The respondent in effect says: "Even though our own wrongful act and neglect is the sole cause of our failure to obtain currency on the check, nevertheless we will make the Fullerton Company stand the loss; we will make it pay the damage which we have caused. We will make it pay the loss and thus escape the ordinary and natural consequences of what we ourselves have done and failed to do."

Such an attitude does violence to the dictates of commonsense and fairness and is directly antagonistic to well-settled principles of common law governing performance of contracts.

"A party to a contract cannot take advantage of his own act or omission to escape liability thereon, hence where he causes or sanctions a breach, he cannot recover damages for non-performance or interpose the breach as a defense to an action on the contract. Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him."

13 *Corpus Juris* 647.

See the following authorities in support of this rule:

Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264.

Northrop vs. Mercantile Trust, etc., Co., 157 Fed. 497.

McElwee vs. Bridgeport Land, etc., Co., 54 Fed. 627.

Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300.

Barton vs. Gray, 57 Mich. 622, 24 N. W. 638.

The Fullerton Company had ample funds on deposit at the Lumbard State Bank to cover its check (R. 38), and Yarosh could have himself gone to the bank and obtained bank notes, gold or silver certificates, legal tender notes or greenbacks, or gold or silver, whatever Gustafson required, upon his check. But Gustafson was willing to and did accept the check and himself undertake to get the currency upon it. As Gustafson wrote under date of July 12, 1926, in his letter addressed to the Fullerton Lumber Company at Minneapolis:

"In regard to the returned 'unpaid' check—$375.96, needless to say that I am very sorry this happened and of course had we known what was going to happen we could have probably avoided the trouble. It surely makes a bad mess of it" (Ex. 3, page 72; R. 27).

There is no warrant for any intimation that the check, if it had been presented to the Lumbard State Bank, at any time up to the time the bank closed at noon of June 25, 1926, would not have been promptly honored and paid.

Under cross examination, the Fullerton agent, Mr. Yarosh, testified that he cashed several checks at the Lumbard State Bank after June 19th up to June 25, 1926. These included one check for $50 cashed on June 23rd, one for $20.55 cashed June 24th, and possibly another one for $300 on June 24th, although he was not sure that a draft obtained for this last one did get through (R. 41-42). Mr. Yarosh made a deposit of $286.88 on June 23rd, dealt at all times with the Lumbard bank as a going concern, and had no knowledge that the bank was likely to close until it in fact did close (R. 42, 45). At the time the check was given and at all times up to the moment when the bank closed, Yarosh for the Fullerton Company had on deposit more than sufficient funds to pay the check involved in the case at bar and all other outstanding checks (R. 38).

As soon as he learned that the check had not been promptly presented and had not been honored, which was ten days after its delivery, and on June 29, 1926, Yarosh immediately took the matter up with Gustafson. He testified as follows:

"Q. When did you first learn that that check had not been paid by the bank

A. On June 29.

Q. What did you do when you received that notice?

* * * * * * * * * *

A. I went right down to the depot to see Mr. Gustafson.

* * * * * * * * * *

A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes, and Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embarrass the bank. I told him why didn't he say something, I could have got him the cash from the bank" (Yarosh, R. 38).

Again, Yarosh testified with respect to who was to go and get the currency as follows:

"Q. On the 19th day of June, 1926, did Mr. Gustafson say anything to you about currency in payment of the freight bill? Did he ask for currency?

A. No, sir.

Q. Did he at any previous time?

A. No, sir.

Q. Nothing was ever said by him about currency?

A. No, sir.

Q. He never demanded cash, or currency, from you in payment of freight bills?

A. No, sir" (Yarosh, R. 45).

Under such circumstances, we know of no authority which supports the efforts of the Railway Company to escape the ordinary consequences of its own acts. It tries to say: "The law requires you to pay all freight bills in currency; you did not get currency to us; maybe we did agree to get it ourselves upon your order, by prompt presentation of your check, and wholly failed to do what we agreed to do; but that makes no difference; there is something so holy about a freight bill that we can disregard anything we said and did, can override ordinary rights; we are not estopped by anything to make you pay twice." Not only is there no authority which supports such an extreme disregard of ordi-

nary rules of right conduct and of individual rights, but there is at least one well decided case in the Federal Courts directly to the contrary.

In *Davis vs. Akron Feed & Milling Company*, 296 Fed. 675, Circuit Court of Appeals, Sixth Circuit, the agent of the railroad company at Akron erroneously told the consignee there that the freight charges on a shipment from Kansas had been paid as far as Chicago. The consignee settled with the consignor on that basis, and allowed him credit for these freight charges. In fact the charges for freight for this part of the haul had not been paid. The consignor had become insolvent so that no collection could be had from him. The Erie, the last carrier, then sued the consignee for the unpaid freight charges, as agent of prior carriers, and the defendant, therein set up the defense that it had relied upon the statement made by the Erie's agent, and had a right to rely upon it. The carrier asserted that this was no defense, because under the Hepburn Act it was required to collect all freight charges and do it in money. The court held in favor of the consignee, that the carrier was estopped from demanding further payment of freight from the defendant. In holding that these common law rules applied, the court said:

> "If the matter were one wholly between the carrier and the consignee, there would be no question that the carrier's representation would estop it from demanding further payment of freight. While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected."

And the court in this case went on to say:

> "In this case no presumption obtains that the consignee knew that the freight upon this consignment from Kansas City to Chicago had not ben paid. This was not a matter of public knowledge. While the question of legal liability is not free from doubt, *the equities are clearly with the consignee, and we are not impressed that the public interest demands such construction of the law as would make the consignee suffer a loss due to the fault, negligence and misrepresentations of the carrier.*"
>
> (Per *Curiam, Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675 (C. C. A., 6th Cir., 1924).)

When Gustafson, for the railroad company, accepted the check in payment of the freight bill, it was no longer in the power of the Fullerton Lumber Company to obtain the currency upon that check, as called for by the check, and it was thereafter in the power of the railroad company to obtain the currency by means of it. The Fullerton Company could not thereafter take the check to the bank, because it no longer possessed the check, it was, after delivery, owned by and in the possession and control of the railroad company.

It would, admittedly, have taken Mr. Gustafson at the most five or ten minutes to have gone up to the bank and to have exchanged the check for greenbacks (R. 27). It was in his sole power to do so. It was not in the power of the Fullerton Company's agent to have done so after the check was delivered.

No justification has been shown for the failure and refusal of the railroad company to treat this check and deal with it as it had dealt with every other check of the Fullerton Company of which we have any knowledge, apart from

an attempt, made for the first time in this litigation in respondent's brief in the Circuit Court of Appeals, to use the words printed on the check, "Collectible at Par Through Federal Reserve Bank at Minneapolis," as some sort of a justification. These printed words were not mentioned at the trial and no attempt was there made by respondent to show their meaning or to refer to them in any way as a justification. We shall deal with them hereafter.

Respondent's position but emphasizes the seriousness of its wrong when reference is made to Dickie's testimony, regarding his investigations into the condition of the bank (R. 32-33). Dickie admits that he had investigated the bank prior to June 16, 1926 (R. 73, Exhibit 4; 33), and thought it was shaky; he admits that he notified Gustafson on June 16th to send the checks clear in to Chicago; but one will look in vain for the slightest intimation from Dickie to the Fullerton Company stating that there was to be a change in his method of dealing with checks. Instead of being some excuse for sending the check around Robin Hood's barn for nine days, the information which Dickie claims he received about the Lumbard bank prior to June 16th was all the more reason why his agent, Gustafson, should have gone to the bank and have obtained the currency in the shortest possible time after receipt of the check. He knew that it greatly increased the risk of loss to the Fullerton Company to send the check six hundred sixty miles away before presenting it to the home bank; he knew that, if the bank was shaky, the danger to the Fullerton Company was thereby greatly increased. And yet, when Dickie was asked why his instructions to his agents were not to immediately obtain currency and ship that, instead of to send the check clear in to Chicago, the only answer Dickie could make was that he thought it was a little risky to his company to ship

the currency, instead of the check, through his own express company (R. 33).

The unsoundness of this argument is all the more apparent, when it leads respondent to contend that it was incumbent upon the Fullerton Company to deliver "legal tender," greenbacks, or gold and silver, in specie to the railroad. Had that been done, say counsel for the railroad, in their argument below, everything would have been all right. But in that case the railroad company would have been compelled to ship the currency or the gold and silver by its own express company, in spite of the alleged risk of such shipment (R. 33), and the very thing for which the railroad company contends demonstrates the clear fallacy of this testimony, by Dickie, in endeavoring thereby to make out some excuse for sending a check drawn on a bank in the same town on a nine days' journey abroad while, according to his own statements, the bank on which it was drawn was becoming shakier and shakier, and the railroad company and its agents had full knowledge that it was shaky.

Ordinarily (*Manitoba Mortgage & Investment Company vs. Weiss*, 18 S. D. 459, 101 N. W. 37), the drawee of a check has until the following day after its receipt to present the check for payment, when drawn on a bank in the same town or city where the check is given and received. This is the well-nigh universal rule. But, in the case at bar, according to respondent's own testimony, the railroad company had reason to believe that the Lumbard State Bank was in shaky condition. The Fullerton Company had no such knowledge, and dealt with the bank on the basis of full confidence, making deposits and maintaining an account therein, right up to the moment of closing (R. 38, 40-42, 45). The railroad company must have clearly known that the Fullerton Company had full confidence in the bank and that it dealt on that

basis in delivering the check.

In such a situation, it may well be doubted that, when the railroad company took and accepted the check in payment of the freight bill, it had any right to hold it even twenty-four hours before presenting it. Under these circumstances, plainly the railroad company should have presented the check for payment as speedily as possible, that same afternoon. There was plenty of time for Gustafson to have gone up to the bank after the 3:00 P. M. westbound passenger train had come and gone. Yet he did not do it, did not take this simple, easy, five-minute walk which would have ended the grave risk which he knew or had reason to believe impended over his good customer and friend, the Fullerton Lumber Company, and of which he and his employer knew and had reason to believe the Fullerton Lumber Company was not aware. The fact is that the railroad company did not want greenbacks or gold or silver that day and does not want them now, as its argument shows. What it desired then and still desires is to continue its practice of accepting checks in payment of freight bills, so as to have the advantage of the convenience and safety of this modern method of remitting money or cash, but with a ruling of this Honorable Court engrafting a new exception to the universal rule requiring prompt presentation for payment so as to relieve the railroad company entirely from any responsibility or risk of loss in its dealing with a check, even though, as in the case at bar, complete loss was caused solely by the acts of the railroad itself.

In fact, no substantial excuse or justification for the railroad company's conduct in the handling of this check can be found. The rule of law requiring checks drawn on a bank in the same town to be promptly presented for payment on the same or next succeeding business day following delivery

is admitted and its applicability is plain. The burden of respondent's argument is one of confession and avoidance: that there should now be added an exception to the rule where a railroad company is involved. There is no solid authority which substantially supports or requires the engrafting of such an exception onto the admitted general rule.

What Dickie should have done, of course, if the railroad company really is sincere in its position that only greenbacks, gold or silver can be taken in payment of a freight bill, was something very different from what he did do. Instead of telling Gustafson to place greater risks upon shippers by sending their checks in to Chicago, he should have told his agent to refuse to take any more checks, or to demand currency, or to notify the Fullerton Company that thereafter checks would be handled differently from the previous method, would now be sent down to Chicago at the risk of drawers thereof. *He did none of these things. There was not so much as the whisper of an intimation to the Fullerton man at Kimball of any of Dickie's fears.* And it was entirely natural that after he learned of what had happened Mr. Yarosh, who had had no suggestion of Dickie's new fears arising on June 16th, should feel that he had been very much misled by these tactics. As he testified:

> "I asked Gustafson what he did that for and he told me he didn't want to embarrass the bank. I told him, why didn't he say something, I could have got him the cash from the bank" (R. 38).

Admittedly, the Fullerton Company was never notified of Dickie's instructions (R. 34). Respondent argues that Dickie "didn't have sufficient information to warrant his advising shippers that we didn't consider the Lumbard State Bank as being in good shape" (R. 35), but this is no

valid excuse and we fail to understand how it has anything to do with the case. It was not necessary for Dickie to notify the Fullerton Company anything about the Lumbard State Bank; what the Fullerton Company was entitled to notice about was about Dickie; that Dickie was now going to require Fullerton checks to go to Chicago, at peril of what would happen; that Dickie was now going to take the position that nothing but "legal tender" was acceptable by his company in payment of freight bills, and henceforth all checks were at drawer's risk and they were not going to present them on the same or next succeeding business day. Some such information would have been the fair thing to have given the Fullerton man, would have put him on his guard. It was information about Dickie that was needed; it had nothing to do with the Lumbard State Bank of Kimball and the remarks of Mr. Dickie at page 35 of the record have no relevancy to any of the material issues in this case. Neither does it have any bearing that the home office of Fullerton Lumber Company is at Minneapolis. This entire transaction took place at Kimball, and every element in it took place as though the Kimball yard were the only one in existence and its office the home office.

So, then, what we have here are statements by Dickie and his agent Gustafson that, at a time when they had information that the Lumbard State Bank was becoming shaky, they deliberately increased by ten fold the risks of loss upon the Fullerton Company, by sending the check on a nine days' journey into Illinois without so much as giving the Fullerton Company an intimation of what they intended to do, or of the reasons for it, or of the fact that this was a radical departure from all prior past procedure. And now they say that they and the railroad company are under no responsibility for all of this, because the Interstate Commerce Com-

mission rules that there shall be no discrimination in freight rates and that freight bills shall be paid in money, not in property of uncertain value.

It seems to us that this ruling of the Interstate Commerce Commission is not a shield but a sword; that it is not a cloak to relieve such conduct of normal responsibility or to engraft some strange new exception upon the law, but is a weapon to protect the public and enforce a different class of responbility: responsibility for favoritism and discrimination. It cannot be used to insulate the railroad company from the normal effect of its acts in the case at bar.

In the case at bar the whole matter was out of the Fullerton Company's hands when Gustafson for the railroad company took the check and undertook to go and get the currency which it called for. The Fullerton Company had no knowledge and no means of knowing what the railroad company did with the check. Yarosh was surprised and dumfounded when he learned for the first time, on June 29th, that the check had not been promptly presented for payment (R. 38). Under such circumstances it is plain that the equities are with the consignee, and that to hold, as respondent urges this Court to hold and as was decided in the courts below, "would make the consignee suffer a loss due to the fault, negligence and misrepresentations of the carrier," directly contrary to the decision in *Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675 (C. C. A., 6th Cir. 1924).

V.

UNDER THE CIRCUMSTANCES DISCLOSED IN THE CASE AT BAR, IT IS SETTLED LAW THAT THE CHECK WAS ACCEPTED IN UNCONDITIONAL PAYMENT.

This involves discussion of assignments of error Numbers 1 to 7, inclusive.

We are aware that respondent may argue that when a check is given and received in payment, it is conditional payment only, depending upon whether the check is honored and paid by the bank upon which it is drawn. (See 21 *Ruling Case Law*, pages 60-62; *Manitoba Mortgage Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37; *McFadden vs. Follrath*, 114 Minn. 85, 130 N. W. 542, and cases cited at page 87 of 114 Minn.)

But this rule only applies in cases where there has been no failure on the part of the creditor to properly carry out his undertaking to make prompt presentation for payment to the bank upon which the check is drawn. Where the failure to obtain currency or its equivalent upon the check is due solely to the laches of the payee in not presenting the check to the bank, in not doing that which he undertakes to do when he takes the check, and which the law plainly requires him to do, we believe that the law is everywhere settled that the check is in such a case absolute and unconditional payment, and the creditor is deemed by the law to have received the currency itself.

Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37 (1904).

21 *Ruling Case Law*, pages 66-67 and cases cited.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542.

Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934.

Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891 (1927).
Campbell vs. Shark (Idaho, 1928), 267 Pac. 458.

In *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, the Supreme Court of South Dakota said:

> "At common law the drawee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. * * * The drawees of a check, in the absence of an express agreement, that the same should be received as payment, may still recover the amount therein specified on the drawers in case the check is duly presented and dishonored * * * but, whenever the failure to collect the check results from the negligence of the drawees, the acceptance of the check constitutes payment * * *. Acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc. And if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment."

Per *Corson*, J., *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37.

In *Tobiason vs. First State Bank of Ashby*, 173 Minn. 533, 217 N. W. 934, plaintiff gave defendant a check in payment of notes. Instead of getting the cash on this check, defendant surrendered it for a draft and this draft was never paid. It was held that plaintiff had paid the notes. Chief Justice Wilson said:

> "The money was there to pay it. * * * To the extent that it was acting for him, it had no right to take anything but money. * * * The check was a condi-

tional payment. * * * The payment would have become absolute had it demanded the money."

Per *Wilson*, C. J., *Tobiason vs. First State Bank of Ashby*, 173 Minn. 533, 217 N. W. 934, 935.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542, contains a succinct statement of the governing principles, together with valuable citations in support of the rule. Justice Simpson for the court said:

"While payment by check usually becomes absolute payment of the debt through payment of the check, it may become so by the certification of the check by the bank for the payee, or through the laches of the payee in not presenting the check to the bank."

Per *Simpson*, J., *McFadden vs. Follrath*, 114 Minn. 85, 130 N. W. 542.

In *Braun vs. Cox*, 202 Iowa 1244, 211 N. W. 891, decided in 1927, the Supreme Court of Iowa said, regarding a check given in payment of an obligation:

"If, as Kearney testified, they received it only conditionally as payment, they were bound to use due diligence in presenting it, and if, by reason of want of diligence on their part as plaintiff's agents, the defendants or the Old Colony Company would sustain loss, the check which the Old Colony Company drew on the United States Bank would operate as actual payment. 30 *Cyc.* 1209. The bank and Kearney, having undertaken the collection, owed a duty to plaintiff (even though acting without compensation) to use diligence to make the collection. See 7 *C. J.* 610, *et seq.*; *Serry vs. Knepper*, 101 Iowa 372, 70 N. W. 601."

Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891, 893.

The rule is not that the drawer of the check is entitled to set-off damages suffered by reason of the payee's negligence in presentment as against a claim for the full amount due on the original cause of action. The rule is that, by failing to use due diligence in collecting the money called for by the check, the check itself becomes absolute payment at least to the extent in money of the loss caused to the drawer.

In *Campbell vs. Shark*, 46 Idaho 278, 267 Pac. 458, the Supreme Court of Idaho stated the rule as follows, after holding that five days after delivery was too long a time to wait before presentment, in a case where the check was delivered and accepted in the same locality in which the drawee bank was located:

> "This suit is upon the original obligation. Defendant's acceptance of the check did not in the first instance constitute payment, it not being shown that there was any agreement that it be taken as an absolute payment. 30 *Cyc.* 1208. His acceptance of the check implied an undertaking to use due diligence in presenting it for payment and giving notice of dishonor, and if the appellant sustained loss by want of such diligence, it would be held to operate as payment of the original indebtedness, at least to the extent of appellant's loss."
>
> Per *Ensign, J., Campbell vs. Shark*, 46 Idaho 278, 267 Pac. 459, 460.

The reasons for these rules are self-evident. A check is an order on a bank to pay cash, money, out of one's deposit of cash or money therein (*Campbell vs. Shark*, 46 Idaho 278, 267 Pac. 459). Where one has the necessity of paying money or cash to satisfy a debt, and gives to his creditor such order for the obtaining of such cash or money, and his creditor accepts the order and undertakes to go and get the cash, he

properly and reasonably must carry out his undertaking diligently. If he fails to act reasonably and diligently and thus is unsuccessful in obtaining the cash which the order calls for, it is only because of his own supervening negligence and through no act of the debtor's that the cash is not delivered. It is, therefore, proper that the order operate as absolute payment, as it would have operated had the creditor carried out his part of the transaction, for it was a part of the debtor's method of delivering the cash and would have delivered the cash but for the wrongful supervening act of the creditor.

An illustration of this principle is the case of *Quarles vs. Taylor & Company*, 195 N. C. 313, 142 S. E. 25. In that case defendants, doing business at Whitakers, North Carolina, drew their check on the Bank of Whitakers, it came to plaintiff at Littleton and was deposited to his credit at the latter place. The Littleton bank forwarded the check for collection. It arrived at the Bank of Whitakers, and this bank charged it on its books to defendants' account and sent its draft to the collecting bank. Before this draft arrived, the Bank of Whitakers closed its doors. It was held that the check was paid and the plaintiff could not recover from defendants. It will be noted that no cash changed hands and none was sent to plaintiff. But plaintiff by his own act in using the method of collecting which he did use, caused the situation, and therefore the debt to him was deemed to have been paid in money or legal tender, although none in fact changed hands.

An excellent statement of the rule, covering practically the situation which we have in the case at bar, is as follows:

> "If a creditor receiving a check is guilty of laches in presenting it, or in giving notice of non-payment, after presentment, and the bank in the meantime suspends

payment, he thereby makes it his own, and it operates as payment of his debt; the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."

21 *Ruling Case Law*, "Payment," Sec. 65, page 66.

See also the following authorities:

Taylor vs. Wilson, 11 Metcalf (Mass.) 44, 45 Am. Dec. 180.

Federal Land Bank vs. Barrow, 189 N. C. 303, 127 S. E. 3.

Lloyd Mortgage Co. vs. Davis, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465, and note, 36 A. L. R. 471.

Kirkpatrick vs. Purgear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

Nuzum vs. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024.

We deem these principles substantially conclusive of the case at bar. They are well settled rules, not only of the common law, but under the Negotiable Instruments Law and under the most recent decisions and under the most recent practices of the custom of merchants, which is the source of our law applicable to checks. No serious attempt was made at the trial or in the court below on the part of the respondent to deny the correctness of these statements of the law or their applicability to the facts as disclosed in the case at bar. If the respondent in this case, instead of being the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, were an individual doing business as such in South Dakota, there would be no room for argument in this case. *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, above cited and discussed, would plainly govern the case and would end, in favor of the petitioner herein, this

attempt to place the loss upon the petitioner notwithstanding the practically admitted and uncontested wrongful handling of the check by the respondent, its laches and neglect in entirely failing to present it for payment as the law requires.

But the argument of the railroad company seems to be that it is above and beyond the ordinary rules of law which would govern the conduct of individuals. What it attempts to say is that regulations of statute law which, plainly and on their face, were not intended to give the railroad company any such high and privileged character, but which were intended to prevent discrimination on behalf of favored individuals, place it above and beyond the rules of law which would plainly govern the conduct of an individual in presenting a check drawn upon a bank in the same town, and allow the railroad company to escape the ordinary consequences of its own wrongful acts in dealing with such check. The extreme risk and the wholly uncontemplated hardship which such an argument places upon the petitioner as drawer of the check is plainly apparent, the consequence of which is an assertion by the railroad company that it can, with immunity, do anything it pleases in the handling of such checks, keep the checks three months if it so desires, or put a tremendous risk of loss upon the drawer of the check, in fact act, if it wishes, wholly above and beyond the law irrespective of the heavy loss which it, by its own unauthorized acts, inflicts upon the petitioner.

There is no authority anywhere apart from the decisions below, as we believe, which gives any warrant to that position of the railroad company or even color of plausibility to so extraordinary a doctrine, and unless and until the railroad is able to produce an authority which squarely and in terms authorizes or warrants and requires such an

extraordinary holding, we submit that the decision in this case should be against the attempt of the carrier to place the burden of the loss upon the shipper, the petitioner, Fullerton Lumber Company. This is a case where the authorities cited by the respondent below do not apply; those authorities do not govern the case where the sole cause of the failure of the respondent to have greenbacks, silver, gold or whatever it wanted in its hands, is its own laches and neglect in plainly violating the well settled rules of law applicable to all persons, irrespective of who they are, in dealing with a check drawn on a bank in the same town in which it is delivered.

VI.

THE CONSTITUTIONAL IMMUNITY OF SOVEREIGN STATES DOES NOT COVER A RAILROAD: EGGLESTON VS. PLOWMAN DOES NOT APPLY.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The controversy involved in the case at bar arose in South Dakota. The District Court and the Circuit Court of Appeals, in arriving at their decisions, placed great weight on the South Dakota case of *Eggleston vs. Plowman*, 49 S. D. 609, 207 N. W. 981, which held that where a taxpayer sent a draft drawn by a nearby bank to a county treasurer in payment of a real estate tax and the county treasurer delayed three weeks in presenting the draft for payment and it was dishonored, the negligence of the treasurer was not binding upon the county and the taxpayer must pay over again.

Without analysis both lower courts have assimilated a railroad company collecting freight charges to a sovereign state engaged in collecting taxes through its subordinate municipalities. The unsoundness of the analogy will be ap-

parent upon consideration of certain fundamental differences. No doubt the railroad company would like to enjoy the immunities from liability enjoyed by sovereign states, would like to have the novel doctrine now proclaimed that *respondeat superior* does not apply to a carrier when it is engaged in collecting freight charges.

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Under this Amendment, a state is not subject to be sued in the courts of the United States by citizens of another state, or by citizens or subjects of any foreign state (*Railroad Company vs. Tennessee*, 101 U. S. 377; *Railroad Company vs. Alabama*, 101 U. S. 832; *Duhne vs. New Jersey*, 251 U. S. 311; 1 *Cooley, Constitutional Limitations*, 8th Ed., pages 21-24 and cases cited).

It is also well settled that a state cannot be sued in its own courts, unless it has expressly consented to the suit. The rule does not rest upon express constitutional provision but upon reasons of public policy. As stated in 25 *Ruling Case Law*, page 413:

> "The doctrine rests upon reasons of public policy—the convenience and danger which would follow from any different rule. It is obvious that the public service would be burdened, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently con-

trolled in the use and disposition of the means required for the proper administration of the government."

See also the following:

Fitts vs. McGhee, 172 U. S. 516.

Smith vs. Reeves, 178 U. S. 436.

Palmer vs. Ohio, 248 U. S. 32.

Ex Parte State of New York, 256 U. S. 490.

Hampton vs. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A. L. R. 1456, note.

Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424.

State vs. Field, 27 N. M. 384, 201 Pac. 1059.

Looney vs. Stryker, 31 N. M. 557, 249 Pac. 112, 50 A. L. R. 1404, note.

White Eagle Oil, etc., Co. vs. Gunderson, 48 S. D. 608, 205 N. W. 614, 43 A. L. R. 397, note.

It is settled law that a state is not liable for the negligent acts of its agents unless, through the legislative department, it assumes such liability (*Mills vs. Stewart*, 76 Mont. 429, 247 Pac. 332, 47 A. L. R. 424; *Lewis vs. State*, 96 N. Y. 71; *Murdock Parlor Grate Co. vs. Com.*, 152 Mass. 28, 24 N. E. 854; *Clodfelter vs. State*, 86 N. C. 51; *Billings vs. State*, 27 Wash. 288, 67 Pac. 583; 36 *Cyc.* 881).

In this situation as to the law, the plaintiff in *Eggleston vs. Plowman*, 49 S. D. 609, 207 N. W. 981, decided in 1926, brought a mandamus action to compel defendant Plowman, in his official capacity as county treasurer, to issue and deliver to plaintiff tax receipts showing that plaintiff had paid the taxes. Eggleston, on March 29, 1924, had transmitted to defendant as county treasurer a draft drawn by an Iroquois, S. D., bank, on a St. Paul, Minnesota, bank, and payable to the order of Plowman for the correct amount of

the taxes due April 1, 1924. Defendant county treasurer held the draft for more than three weeks before presenting it for payment, and on the twenty-third day after he received the draft the Iroquois bank failed and the draft was dishonored. Defendant Plowman refused to issue the tax receipt and mandamus action was brought, predicated upon the rule of *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, that where the drawee is negligent in presenting the check or draft, by reason of which negligence it fails to be honored, the draft will be held to be absolute and not conditional payment. The Supreme Court of South Dakota held that this rule, well established as between individuals, did not apply to a county treasurer acting in his official capacity as a state tax collector, where the suit was not against him individually but was against him in his official capacity to compel him to do an offical act. The Court said:

> "It must be borne in mind that this is not a proceeding by plaintiff against defendant as an individual to recover damages sustained by plaintiff because of unreasonable delay in presentment of the draft. • • • This proceeding is by the property owner himself against the defendant in his official capacity as a county officer seeking to compel the performance of an official duty, namely, the issuance of a tax receipt • • •" (49 S. D. 609, 611).

This, then, was the situation: The suit in the Eggleston case was a suit against the defendant in his representative capacity as an officer of the State, and such a suit is in substance a suit against the State and cannot be brought (see *Fitts vs. McGhee*, 172 U. S. 516, 526; *Smith vs. Reeves*, 178 U. S. 436; *State vs. Field*, 27 N. M. 384, 201 Pac. 1059, where the

action was mandamus to compel issuance of a deed). It was an attempt to deprive the State of its tax by placing upon the State liability for the negligence of its officer in delaying three weeks or more before presenting the draft for payment. It is settled law, as we have just seen, that the State, by reason of its sovereign character, is not liable for that negligence, and this rule is the reason and basis of the decision in the Eggleston case. As the Supreme Court of Montana said, in *Mills vs. Stewart*, 76 Mont. 429, 247 Pac. 332:

> "The state, like any other corporation, can act only through agents, and if the state of Montana were a private corporation, it would be responsible to Rietz in an action at law for the damages resulting proximately from the negligence of its agent in charge of the dormitory building. But the state is a public corporation, and out of considerations of public policy the doctrine of *respondeat superior* does not apply to it unless assumed voluntarily. In other words, the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability."
>
> *Mills vs. Stewart*, 76 Mont. 429, 247 Pac. 332, 333, decided in 1926.

In *Lewis vs. The State*, 96 N. Y. 71, the New York Court of Appeals stated that it was aware of no principle of law nor of any adjudged case which applies the doctrine of *respondeat superior* to a sovereign state or makes it liable for the negligence or misfeasance of its agents or officers. In *Murdock Grate Co. vs. Commonwealth*, 152 Mass. 28, the statement was approved that "no government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents."

When, therefore, by reason of the sovereignty of the State and the public policy incident thereto, it cannot be sued and the doctrine of *respondeat superior* does not apply to it, of course the law as laid down in *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, cannot be invoked against such sovereign state, for that rule requiring prompt presentation of checks is founded upon amenability to suit, upon *respondeat superior*.

But a railroad company is not a sovereign; it is not immune from suit. The Eleventh Amendment to the Federal Constitution does not apply to it. There is no public policy which provides that its functions are of so high and governmental a character as to give it the privilege of saying that no one can bring an action against it without its consent. The law is settled everywhere that the rule of *respondeat superior* does apply to a railroad company. None of the elements which exist in the case of a sovereign state exist in the case of the railroad company, none of the reasons upon which the decision in *Eggleston vs. Plowman*, 19 S. D. 609, 207 N. W. 981, is founded, relate to a private railroad corporation. The decision in that case applies only to government; it was never intended to apply to individuals, whether natural persons or corporations, and the rule of *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, remains in full force and effect, applicable as well to private railroad corporations as to natural persons.

VII.

THE DEVICE WHICH THE RAILWAY COMPANY SEEKS TO USE TO PREVENT THE GENERAL RULES OF LAW APPLICABLE TO OTHERS FROM GOVERNING ITS OWN CONDUCT AND TO ESCAPE RESPONSIBILITY FOR THE CONSEQUENCES OF ITS OWN ACTS IS THE INTERSTATE COMMERCE COMMISSION RULING REGARDING FREIGHT CHARGES AND AN ATTEMPTED EXTENSION OF THE RULE OF LAW THAT FREIGHT BILLS CANNOT BE COMPROMISED BY DELIVERY OF SOMETHING OF UNCERTAIN VALUE. THAT RULING AND THAT RULE OF LAW DO NOT GOVERN THIS CASE.

This involves discussion of assignments of error Numbers 1 to 7, inclusive.

Paragraph 7 of Section 6 of the Interstate Commerce Act, Title 49 of United States Code, provides as follows:

> "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of

passengers or property, except such as are specified in such tariffs."

(49 U. S. C., Sec. 6, Par. 7.)

At the trial in the District Court, respondent asserted that Conference Ruling No. 207 of the Interstate Commerce Commission was sufficient to cut across all of the ordinary rules of law governing individual rights and to insulate the railway company from the consequences of its own wrong in improperly dealing with the check. This contention seems to have had great weight with the trial court, for he quoted the conference ruling in his decision (R. 13-14) as one of the reasons therefor. This ruling is as follows:

"207. Payment for Transportation. Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules."

(Adopted by the Interstate Commerce Commission September 15, 1906.)

It will be noted that the principal thing with which the Commission was there dealing is the matter of discrimination, for the Commission gives as the reason and basis of its ruling the view that the prohibition in the law against varying from established rates "precludes the acceptance of service, property or other payment *in lieu* of the amount of money specified in the published schedules." (Italics our's.)

In the case at bar there was no attempt to deliver service, property or other payment in lieu of the amount of money specified in the published schedules. Instead, the intention was to deliver $375.96, the exact amount of money required. That intention would have been completely carried out but for the railroad company's wrongful handling of the check. Checks are orders for the payment of money; they are not orders for delivery of "service, property, or other payment." Accordingly, they do not come within any of the things at which Interstate Commerce Commission Ruling 207 was aimed.

Everywhere freight charges are paid by check. Practically every freight bill at Kimball was paid by check from 1922 to June 19, 1926 (R. 22, 40, 45, 48). Practically every freight bill at all of the many yards (nearly 100 of them) of Fullerton Lumber Company has always been paid by check. Fully ninety-eight per cent of the remittances in modern business life are made by check, and to now require such remittances to be made in gold, or greenbacks, would place such an obstacle in the way of the free flow of payments as would seriously disrupt the course of modern commerce and trade.

And why are such remittances practically universally made by check? Because a check is a safe and convenient method of paying, "not service, property, or other payment," but money. It is an easy and facile method of transmitting and delivering the exact amount of money or cash required to be paid, it is easy to send by mail or other transmission agency, and its use facilities bookkeeping and the accurate recording of payments of money.

In *Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675, 677-678 (C. C. A., Sixth Circuit, 1924), the Circuit Court of Ap-

peals ruled to the contrary of respondent's contentions, saying:

> "While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected."

The case just cited shows with conclusive effect that the Interstate Commerce Act in its provisions against discrimination in charges does not abrogate the Law Merchant or deprive a shipper of the benefit of the salutary rule that he is not to be held liable for a non-payment in currency of freight charges caused by the act of the carrier.

In *Pennsylvania R. R. Co. vs. Olivit Brothers*, 243 U. S. 574, an action by a shipper for damages for negligent transportation of carloads of watermelons, the carrier sought to prevent the shipper from recovering as part of the damages the freight charges paid, by recourse to the same section of the Interstate Commerce Act relied upon by respondent in the case at bar. The defense was that such recovery would violate the statutory prohibition against discrimination. This Court overruled the defense, holding it untenable in the absence of a showing of an actual or attempted evasion of the statute. We deem the case at bar similar in its essential questions to the Olivit case.

There is nothing in Interstate Commerce Commission Conference Ruling 207 which, either in terms or by implication or otherwise, forbids the use of checks in transmitting and remitting money. A check in nowise comes within the practices of discrimination at which that ruling was aimed. That ruling says nothing about checks, makes no reference to the

common business practice of remitting payments of money by means of checks, and to attempt now to spell out of it a prohibition against use of checks in making remittances is to inject something into that ruling which it does not contain and never was intended to contain.

The same thing is true of the cases cited by respondent at the trial and relied upon by the lower courts in their opinions, *Louisville & Nashville Railway Company vs. Mottley*, 219 U. S. 467, *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 486, and *New York Central & Hudson River Railroad Company vs. Gray*, 239 U. S. 583. In the first of these cases Mottley and wife had been injured in a train wreck and made claim against the railroad for damages. There was no trial or other adjudication of the amount of these damages, but the railroad company settled the claims without trial by agreeing to issue Mottley and wife free passes on passenger trains for the remainder of their lives. The Court held that this agreement was not binding on the railroad company, for the reason that there was nothing definite or certain about the claim for damages, to allow it to be thus traded for free passes opened the door to discrimination, and that money only, and not uncertain claims, services or property, was receivable in payment of passenger fares. In the second of these cases, *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 486, the Munsey Magazine Company entered into an agreement with the railroad to give it a certain amount of advertising in exchange for free passenger passes. The Court held that this agreement was in violation of the rule that the railroad could not exchange transportation for property or service, and must receive the amount of money specified in the published tariffs of rates. *New York Central & Hudson River Railroad Company vs. Gray*, 239 U. S. 583, was a like case, wherein the

railroad company agreed to buy a map for $750 and the seller agreed to accept $150 in cash and the remainder in passenger tickets in payment. The Court held that this trade of passenger transportation for property could not be made.

We have no desire or need to in any way criticise these cases. They are undoubtedly well decided and represent the law. But they do not apply to or cover a case like that at bar. They say nothing concerning the general business practice of remitting money by check. Every word in each of these cases is entirely consistent with the view for which we contend. They do not deal with the question whether, when a railroad accepts a check drawn for the sum of $375.96 in money in payment of freight charges, and then negligently fails to present that check for payment as the law requires it to do, so that loss is caused the drawer, it can saddle that loss onto the drawer in spite of its own wrongful act.

The Interstate Commerce Commission Conference Ruling and the cases which respondent cites provide that the carrier cannot charge, collect or receive a greater, less or different compensation than the rates specified in the tariffs, and that the collection of rates must be in money and may not be in property or services, but the force and effect of these rulings is to prevent discrimination in charges and there is nowhere to be found in them any provision which abrogates the rules of the Law Merchant in favor of a carrier or which is intended to or does put a stop to the well-nigh universal practice of making remittances of money by means of checks. Nowhere is it held that the carrier may not accept an order for money and undertake to go to the bank and get the currency in payment of a freight bill. The universality of this modern method of remitting money is well illustrated by *City of El Paso vs. Two Republics Life Insurance Company,* Texas 1925, 278 S. W. 231.

A check drawn on a bank and given to that bank in payment of a sight draft is a payment in cash, although no currency or greenbacks or gold or silver actually change hands (*Andrews vs. Hartley State Bank*, 207 Iowa 407, 219 N. W. 929). This is true, although a bill of lading is attached and the freight charges thereon must be paid in order to get the goods (*Messenger vs. Carroll Trust and Savings Bank*, 193 Iowa 608, 187 N. W. 545). As the Court said in the case last cited:

> "* * * this method of collection was the full equivalent of the payment of money * * *. We deem it clear that the net result of the transaction of payment by the Swaney Company and the receipt thereof by the collecting bank was the same as though the Swaney Company had drawn the currency into its own hands by means of check, and had thereupon delivered the same to the collecting bank in payment of the sight draft. Such is the holding of the cited cases."
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> (*Messenger vs. Carroll Trust & Savings Bank*, 193 Iowa 608, 187 N. W. 545.)

The rule is that the check is the mechanism or means by which the money is remitted and paid, thus avoiding the inconvenience of going to the bank each time and obtaining a large roll of greenbacks or a heavy sack of silver or gold. The respondent railroad company in this case contends that that mechanism or means cannot be used, that in every case wherein freight charges are concerned the shipper must himself go to the bank and obtain the roll of bills or the sacks of silver and gold and convey them to the agent of the carrier. But the authorities are to the contrary. See, among others, the following:

Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A., Fifth Circuit, 1903).

Bennett vs. Bank of Commerce and Trust Co., 229 Fed. 950 (Dist Ct., Miss., 1914).

Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742.

Palmer vs. Golden, 127 N. Y. Misc. 487, 216 N. Y. S. 509.

Abeles vs. Guelick, 101 N. J. E. 180, 137 Atl. 853.

In *Montgomery County vs. Cochran*, 121 Fed. 17, an Act of the Legislature of Alabama provided for the issuance and sale of certain county road bonds, and that "the proceeds of said bonds shall be paid over to and kept by the treasurer of said county" and he shall be "responsible for the safekeeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer." Cochran, as county treasurer, by one Kohn, his agent, who was in the employe of a banking house, gave the county board a receipt for $111,109.58, proceeds of the bonds, they were immediately sold, and Kohn took therefor the check of the banking house, Josiah Morris & Co., for that amount. He indorsed the check in the name of the county treasurer, made out a deposit slip and deposited the check in the bank to the credit of the county treasurer, Cochran. No money actually passed as between the purchaser of the bonds and the county treasurer. Seventeen days later, the bank closed its doors, and this action was brought against the county treasurer and his bondsman to recover the proceeds on the ground that the treasurer had failed to keep them safely. The defense was that there were in fact no proceeds, because the treasurer had no right to receive anything but coin or bank bills in payment for the bonds, and, therefore, that there was no legal payment for them by means

of the check. The Court held that this contention was unsound, in trenchant language directly applicable to the construction of the Conference Ruling upon which respondent herein lays so much stress:

"Was it the intention of the Legislature that no transactions with the board of revenue and the purchaser of the bonds and the treasurer should be permitted except by the use of coin or bank bills? The statute must be construed in the light of commercial usage and common knowledge of business transactions. The word 'money,' when used as in this statute, does not mean only coin and bank bills. 'Such a construction,' said Lyon, C. J., in *State vs. McFetridge*, 84 Wis. 473, 515, 54 N. W. 1, 10, 998, 20 L. R. A. 223, 'would be extremely technical, and is, we think, uncalled for. "Money" is a generic term and may mean not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value.' And it was held that a certificate of deposit was money within the meaning of a statute. In *Taylor vs. Robinson* (D. C.), 34 Fed. 681, Judge McCormick said: 'The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term "land" designates all real estate.' In *Allibone vs. Ames*, 9 S. D. 74, 81, 68 N. W. 165, 167, 33 L. R. A. 585, the Court applies this definition to a certificate of deposit: 'When the certificate of deposit was delivered to plaintiff, and accepted by him, it had all the characteristics of money. Its return to the bank must be regarded as a deposit of that amount of currency. It was, the parties so treating it, precisely the same as if the treasurer had received the

coin and again deposited it. To say that if a person deposits a draft or certificate of deposit with a bank, and receives credit for the amount of it, he does not make a deposit of that amount, is simply absurd, in view of the modern methods of transacting business.'

And there are other authorities to the same effect, showing that the words 'funds or money' and 'proceeds of sale,' as used in the act, should not be confined in their meaning to coin and bank bills. *State vs. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom vs. Brandreth*, 16 L. R. Eq. Cases, 475; *State vs. Hill*, 47 Neb. 456, 66 N. W. 541; *People vs. McKinney*, 10 Mich. 55; *Bork vs. People*, 16 Hun. 476.

The use of checks, certificates of deposit, and other commercial instruments is so universal and so essential in large transactions that we cannot assume that the Legislature of Alabama meant to forbid their use in the negotiation and sale of the bonds. If Josiah Morris & Co. had had the coin on hand to pay for the bonds in question, the transaction would have been conducted by the use of checks or certificates of deposit, and we think without any violation of the terms of the statute. If silver coin had been in bank as the basis of the transaction, its weight (about 6,456 pounds) would have made the use of checks or certificates necessary to conveniently complete the transaction. We think, therefore, that checks or certificates of deposit received in good faith by the board of revenue, and delivered to the treasurer, or delivered by direction of the board of revenue to the treasurer, would be 'funds or money' or the 'proceeds of sale' of the bonds in the hands of the treasurer. The check for the price of the bonds in the hands of the treasurer, he having receipted for the same as money,

was 'funds or money' in his hands, within the meaning of the statute. * * *"

> Per *Shelby*, Cir. J., *Montgomery County vs. Cochran*, 121 Fed. 17, 21-22 (C. C. A. Fifth Circuit, 1903).

If this reasoning of the Circuit Court of Appeals of the Fifth Circuit is correct, and we have every reason to believe that it is, there is no basis whatever for respondent's contention, upon the soundness of which its whole case rests, to the effect that the Interstate Commerce Commission ruling requires payment of freight bills in gold or silver coin or greenbacks. So technical and narrow a definition of the term money is unsound and unauthorized, and is wholly unsuited to and out of touch with the current of modern commercial life.

In *Bennett vs. Bank of Commerce and Trust Company*, 220 Fed. 950, decided in the District Court of Mississippi in 1914, the decision and reasoning of *Montgomery County vs. Cochran*, 121 Fed. 17, were approved and followed, and Judge *Niles* therein said:

> "Commercial usage in the everyday safe and convenient practice of treating checks as money is almost universal, and the legality of such a payment in the instant case is well settled and especially binding upon this Court, upon the authority of *Montgomery County vs. Cochran*, 121 Fed. 17, 57 C. C. A. 261."

In *Palmer vs. Golden*, 127 N. Y. Misc. 487, 216 N. Y. S. 509, the Court said:

> "* * * In principle there is no legal difference between the check and the cash."

In *Abeles vs. Guelick*, 101 N. J. E. 180, 137 Atl. 853, objec-

tion was made that there was no valid payment of the proceeds of a mortgage to the mortgagor, because a check therefor was given. The question was whether these had been paid in money. The Court held that they were so paid and said:

> "Objection is based on the fact that a check instead of cash was delivered to the mortgagor. This objection is unsound. If actual cash was not advanced, it was the equivalent of cash, and by delivery of the check the mortgagee put it in the power of the mortgagor to immediately convert the check into cash. The check was payable on presentation at the Broad & Market National Bank in Newark, N. J. In modern business transactions checks pass as cash, and, while not legal tender or actual cash, commerce and trade would be very much restricted, if checks were not accepted in lieu of cash. Where so accepted they should be so considered by the courts."
>
> *Abeles vs. Guelick*, 101 N. J. E. 180, 137 Atl. 853.

It is in the light of these authorities that the narrow, restricted, and technical nature of the respondent's construction of the Interstate Commerce Commission ruling is clearly apparent. Respondent first is compelled to say that this ruling must be construed to mean that gold and silver and greenbacks are the only medium or mechanism of payment which can ever be accepted in payment of freight bills, and this in the face of the fact that there is not one word in that ruling or in the Supreme Court cases dealing with the subject which so states or so requires. Then next respondent says that, as so construed, it is entitled to take advantage of the ruling to put the burden of loss upon petitioner, even though it was solely through the wrongful act of respondent

that coin or greenbacks were not obtained. Such a position is not only unjust: the legal device by means of which respondent seeks to achieve it is wholly ineffective for the purpose for which respondent seeks to use it.

In its argument in the trial court, respondent made the following statement:

> "The identical question was submitted to the Circuit Court of Brule county, South Dakota, in the case of *C. M. & St. P. Ry. Co. and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the C. M. & St. P. Ry. vs. Bradshaw*, and decided by his Honor Judge Bakewell on June 25, 1928. This, of course, was not an Appellate Court but the check was received at the same station on the same bank and on the strength of the decisions quoted above, the Court held the railway company was entitled to be paid in cash and the charges were paid by Bradshaw."

This was the Bradshaw check referred to by Gustafson (R. 20). Our investigation of this case shows that this information regarding it is in error. We believe that this case was uncontested and there was no decision of any kind by the Court. The parties entered into a stipulation of settlement, wherein the railway company agreed to reduce the claim somewhat if it would be paid and Bradshaw thereupon agreed to pay. The case is of little value as a precedent, there being no contest and no decision by the Court.

The case of *Chicago, Rock Island & Pacific Railway Company vs. Fullerton Lumber Company*, decided in the District Court of Pocahontas county, Iowa, is, however, identical in its facts with the case at bar, although the parties are different, and that lower state court case was genuinely contested and the Court therein made and rendered its decision

in favor of the defendant and against the railway company, on or about October 20, 1928. As the authorities stand in the trial courts of state jurisdictions, therefore, they are in favor of the petitioner herein.

VIII.

Adoption of Respondent's Views Would Annul the Law Merchant and Result in Great Inconvenience in the Transaction of Modern Business.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The well-nigh universal custom is, as we have heretofore seen, to pay freight charges by check. The Fullerton Lumber Company, a large concern operating about a hundred yards, has always employed that method. Nearly all business houses of any size do likewise. It would be almost impossible to carry around large quantities of greenbacks and gold and silver coins, and every time a car of lumber or coal comes in count out a handful or a sackful and transfer it to the railway agent in return for a receipt of the freight bill and release of the shipment. Yet that is the practice for which the respondent here contends. The difficulties of protection would become very considerable, and it would be necessary to employ extra men at many yards for the sole purpose of guarding the coin, in a manner similar to that required by the banks when transporting gold and currency about a city. It can be done, but at much expense and trouble, and would result in impeding and restricting the quiet, orderly, smooth and rapid flow of remittances which means so much to the efficient conduct of modern, complex business operations.

In the case of this petitioner, it was necessary, as soon as

Judge Dewey rendered his decision, to notify every yard located on the Milwaukee Railroad, about forty of them, not to pay any more freight bills by check. This has added to the burdens of the men in charge of these yards, has required additional time in the making of remittances, has in some instances disturbed existing financial arrangements and adversely affected good-will at certain of the local stations, upon the favorable growth of which the present volume and future growth of the business largely depends.

Bouvier defines the Law Merchant as follows (*Law Dictionary*, 3rd Ed., page 1882):

> "The general body of commercial usages in matters relative to commerce. * * * These usages, being general and extensive, partake of the character of rules and principles of law, not of matters of fact, as do usages which are local or special. They constitute a part of the general law of the land, and, being a part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio;* Winch. 24; and this application is not confined to merchants, but extends to all persons concerned in any mercantile transaction. * * * The development of the law merchant as part of the common law has continued without ceasing. Evidence of living general usage is still admissible to add new incidents to its contents, provided they do not contradict any rule already received."
>
> *Bouvier, Law Dictionary*, 3rd Ed., page 1882.

It has been the source of much that is progressive in the common law concerning trade, and commerce, and concerning transportation, upon which our modern trade and commerce is so closely dependent. To now go backward, as re-

spondent contends we must do, and construe an Interstate Commerce Commission ruling so as to exclude payment of freight bills by check, selecting such a construction by design where neither the words nor plain intent thereof require it, would be unwise, would amount to impeding the flow of commerce and trade at a time when every effort is being made by businessmen to speed it up and facilitate prompt deliveries and equally prompt and facile remittances. The contention of the respondent is not required by anything in the law and is a viewpoint promotive of business friction and difficulty.

It is the universal custom of businessmen to make remittances by check. To adopt respondent's view would annul that custom in so far as it applies to the large field of remittances in payment of freight charges. No merchant could afford to run the risks of loss which remittance by check would entail if the respondent's views were to prevail.

IX.

The Words on the Check "Collectible at Par Through Federal Reserve Bank at Minneapolis" Are No Justification for Respondent's Failure to Promptly Present the Check for Payment.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

This point was not raised in the trial Court. It was raised by respondent for the first time in its brief in the Circuit Court of Appeals. It is wholly outside of the record. Had respondent any real faith in it, respondent would have raised it in the trial Court and would have produced the testimony of bankers to show the true meaning of these technical words. No such testimony was produced, and, in its

absence, we may properly conclude that such testimony would not have been favorable to respondent's contention.

The single case cited by respondent, *Spokane Valley State Bank vs. Lutes*, 133 Wash. 66, 233 Pac. 308, decided by the Supreme Court of Washington, has no application. It does not deal with or refer to the statement printed on this check nor to any words of similar import or character. It does not involve a check drawn on a bank in the same city or town in which the drawer resides and in which the check was delivered. And, finally, there was introduced in that case affirmative evidence showing that it was in accordance with the custom of Washington banks to send an interstate item drawn on a Billings bank through the Federal Reserve Bank at Helena, by which it was forwarded direct to Billings, instead of itself sending the check direct to Billings. We have no such testimony in the case at bar, nothing to show that it was the custom of local people or local banks at Kimball to send checks drawn on the Lumbard State Bank of Kimball six hundred sixty miles southeast to Chicago for collection. Such a custom would have been absurd even if it could have been shown but it was not shown and could not have been shown.

The words, "Collectible at Par Through Federal Reserve Bank at Minneapolis," have nothing whatsoever to do with the time, manner, or place of presentation of a check for payment. They do not alter any of the applicable rules of law or affect the situation in any way. They originated in a circular letter of the Federal Reserve Bank of Minneapolis, sent to all of its members, Circular No. 35, dated June 15, 1916. In that circular the Federal Reserve Bank, among other things, stated:

> "It is requested that you have all checks drawn on your bank stamped or imprinted, 'Collectible at par

through the Federal Reserve Bank of Minneapolis,' thus announcing the fact that your checks are not subject to exchange charges. * * *"

The whole purpose of these requested words was to inform holders of these checks at points distant from the home town of the bank that it was not necessary for them to pay a discount or other so-called exchange charge in order to have the check paid, and that, if anyone did attempt to collect such discount or make an exchange charge, the exaction could be avoided by sending the check to the Federal Reserve Bank. But such information could have no value or importance where the check was drawn and delivered in the same town as the bank on which it was drawn was located, for then there could arise no possible question of discount or exchange charges; the bank on which it was drawn, of course, had to pay the full face amount and all that it was necessary for the holder to do was to present the check over the bank's own counter at the town in which he and the bank both lived. It cannot possibly be spelled out of these words, as we think, that there was any intention to abrogate the applicable rules of law requiring prompt presentment when the bank is located in the same town, and in such case the whole question of par collection to which these words were directed does not arise and cannot exist.

In Circular Number 193, dated January 15, 1920, the Federal Reserve Bank of Minneapolis again called the attention of its members to the matter, in the following words:

"It is requested that you have all checks drawn on your bank stamped or imprinted, 'Collectible through the Federal Reserve Bank of Minneapolis,' thus announcing the fact that your checks are so collectible. * * *"

This same request was repeated in the same language in Circular Number 227, dated October 1, 1920, and Circular Number 245, dated April 1, 1921. In Circular Number 358, dated January 1, 1927, which is the one now in effect, the Minneapolis Federal Reserve Bank amplified its statement of the matter, and while this most recent circular was issued after the date when the transaction involved in the case at bar occurred, it well illustrates the original purpose of the request and the continuity of the policy upon which it was based when originally made in 1916, and is as follows:

"SECTION VI.

"COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK AT MINNEAPOLIS.

"Member banks are entitled to place the words 'Collectible at par through the Federal Reserve Bank of Minneapolis' on their own checks and the checks used by their depositors. Your attention is called to the desirability of availing yourself of this privilege."

"SECTION IX.

"INDIRECT ROUTING.

"In the interests of good banking, the indirect routing of checks will be discouraged and member banks will not be permitted to deposit with us or send direct to other Federal Reserve Banks or branches for our account, any checks payable in other Federal Reserve districts, which bear the endorsement of banks located in other Federal Reserve districts, in case where it is evident such checks have been routed indirectly."

The strained and heretofore unknown and unheard of meaning which respondent sought to read into these words

in its brief in the Circuit Court of Appeals is not only logically unwarranted by anything contained in the words themselves, but also is directly contrary to the policies of the Federal Reserve Bank which originally prompted the suggestion that these words be printed on the checks. The policies of the Federal Reserve Bank are directed toward speeding up exchanges, making them more direct, reducing the time required for transmittal, eliminating all obstacles to quick, reliable transit of checks and eliminating also any charges or discounts which might interfere with par collection. The charging of exchange was the barrier to which the words "Collectible at par through the Federal Reserve Bank of Minneapolis" were aimed. The Federal Reserve Bank sends all of its items directly to the bank upon which they are drawn. It has cut the times formerly required for transmission of checks just about one-half. It has co-operated with the National Association of Credit Men in promoting par collection. Charging of discount or exchange promoted indirect routing of checks, for that was the method used to evade payment of exchange. The whole energy of the Federal Reserve Bank has been directed to prevent indirect routing.

Yet respondent, in the Circuit Court of Appeals, made the argument that one of the measures taken by the Federal Reserve Bank to prevent such indirect routing may be used instead to promote it! Surely nothing could be more foreign to both the spirit and the letter of these words as so printed on the check, and respondent's argument contains on its face its own refutation. It would be impossible to find a more striking example of indirect routing than the course which the check here in question took at respondent's hands.

We realize that the authorities to which we here refer are not public records. But these circulars are all on file at the

Federal Reserve Bank at Minneapolis, and they have been made available to us through the courtesy of Mr. Harry Yaeger, Deputy Governor of the Minneapolis Federal Reserve Bank, and Mr. Gray Warren, its cashier, with the understanding that these authorities are equally available to the other side and to the Court. The accuracy and fairness of our statements as to the meaning and effect of the words here in question may be fully checked and verified at that source.

X.

The Trial Court Should Have Granted Defendant Leave to Interpose in This Action Counter-Claim for the Loss Caused by Respondent's Wrongful Acts.

This involves discussion of assignment of error Number 8.

The opinion of the Circuit Court of Appeals for the Eighth Circuit in this case upholds denial of permission to interpose counter-claim in this action, on the broad ground taken by the trial court, holding that even a counter-claim arising out of the very transaction for which action is brought cannot be interposed where the subject-matter of the action is a claim to recover freight charges (*Fullerton Lumber Co. vs. C. M. St. P. & P. R. R. Co.*, 36 F (2d) 180; R. 81-82; 54-55).

This ruling is disposed of by the decision of this court in *Chicago & Northwestern Railway Company vs. Lindell*, 281 U. S. 814, argued January 23, 1930, and decided February 24, 1930, which holds to the contrary and settles the law upon the subject. In the Lindell case, Mr. Justice Butler said, for the court:

> "The adjustment of defendant's demand by counter-claim in plaintiff's action rather than by independent

suit is favored and encouraged by the law. That practice serves to avoid circuity of action, incovenience, expense, consumption of the court's time, and injustice. *Rolling Mill Co. vs. Ore & Steel Co.*, 152 U. S. 596, 615, 616. *Railroad Company vs. Smith*, 21 Wall. 573, 579. *Partridge vs. Insurance Company*, 15 Wall. 573, 579. In the case last mentioned the court, speaking through Mr. Justice Miller, said (p. 580): 'It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the state have attached to all plaintiffs of allowing just and legal set-offs and counter-claims to be interposed, and tried in the same suit and in the same forum.'

The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges is not repugnant to the rule prohibiting the payment of such charges otherwise than in money. The adjudication in one suit of the respective claims of plaintiff and defendant is the practical equivalent of charging a judgment obtained in one action against that secured in another. Neither is to be distinguished from payment in money.

It is well understood that payment by carriers to shippers under the guise of settling claims for loss and damage may in effect constitute discrimination that the Act was intended to prevent. But it is not suggested how opportunity for collusion in respect of such matters would be lessened by abolishing counter-claims in cases such as this. Collusion and fraud may be practiced in the defense and settlement of separate actions brought on such claims as well as when the same matters

are put forward as off-sets or counter-claims.

The Act ought not to be construed to put aside state laws and long established practice in respect of pleading unless the intention of Congress so to do is plain. There appears no reasonable probability that the relegation of shippers to separate actions for the enforcement of their claims for loss or damage would operate more effectively to enforce the purpose of Congress to prevent discrimination. There is no substantial ground upon which the Act may be given the construction for which the carrier contends."

Butler, J., *Chicago & N. W. Ry. vs. Lindell,* 281 U. S. 14, 15-18.

The statutes of Minnesota make the pleading of a counter-claim permissive. Mason's General Statutes of Minnesota, 1927, Sec. 9253, provides:

"9253. *Contents of Answer*—The answer shall contain:

1. * * *

2. A statement, in ordinary and concise language, of any new matter constituting a counter-claim or defense.

3. * * *"

The requisites of a counter-claim are set forth in Section 9254 as follows:

"9254. *Requisites of counter-claim—Pleading does not admit*—The pleading of a counter-claim shall not be construed as an admission of any cause of action alleged in the complaint. Such counter-claim must be an existing one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and must be:

1. A cause of action arising out of the contract or

transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, or

2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun."

(*Mason's General Statutes of Minnesota*, 1927, Secs. 9253, 9254.)

It is obvious that the counter-claim which petitioner here sought to interpose meets these requirements.

While the trial court decided this particular action in favor of the respondent, and held that the respondent was entitled to recover, and to place the loss due to the closing of the bank in the first instance upon the petitioner, nevertheless the trial court reached this result with great reluctance, deeming himself precluded from a different view by reason of the Interstate Commerce Commission Conference Ruling No. 207, and the cases in this court dealing with the same subject.

This decision did not mean, however, that the trial court really felt that the loss should rest upon the petitioner, for the trial court made this reservation in his decision (R. 14):

> "This decision and the following judgment is made without prejudice to the defendant to bring an action against the plaintiff or its assignor for loss resulting from the failure to present the check for payment within a reasonable time, or any other negligence or negligent acts on the part of this plaintiff or its assignor."

After the making of the decision, petitioner duly moved for a new trial (R. 54), and as one of the grounds of that motion asked for leave to amend the answer so as to include a counter-claim for respondent's negligence in not properly

dealing with or presenting the check for payment. This motion was denied (R. 55), and error was duly assigned directed at such decision in the Circuit Court of Appeals (R. 75), and has been duly assigned here (No. 8, *Petition for Certiorari*, page 19, *supra*, page 12).

This portion of the decision of the trial court well illustrates what was in his mind. He did not think that respondent was entitled to the decision upon the merits but only held that any other decision was precluded by paramount authority.

Prior to the decision of the Lindell case, the authorities were in hopeless confusion on this question of allowance of counter-claim. Prior to the decision in the case at bar there was no decision by a Circuit Court of Appeals on the question. The following authorities permitted counter-claim in actions to recover freight charges:

Chicago & North Western Railway Company vs. Lindell, 281 U. S. 814; *C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp.*, 26 F. (2d) 90 (Dist. Ct., Minn., Judge John B. Sanborn); *Payne vs. Clarke*, 271 Fed. 525 (D. C. S. D. Calif., Judge Bledsoe); *C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co.*, 262 Fed. 715 (D. C. E. D. Wis., Judge Geiger); *Wells Fargo & Co. vs. Cuneo*, 241 Fed. 727 (D. C. S. D. N. Y., Judge Mayer); *Central of Georgia Ry. Co. vs. Birmingham Sand & Brick Co.*, 9 Ala. App. 419; *Battle vs. Atkinson*, 9 Ga. App. 488; *Penn. R. Co. vs. Bellinger*, 101 N. Y. Misc. Rep. 105; *N. Y. Central R. Co. vs. Federal Sugar Co.*, 201 N. Y. App. Div. 467; *Nashville, C. & St. L. Ry. vs. Tennessee Mill Co.*, 143 Tenn. 237.

The following cases denied right of counter-claim: *Michigan Central R. Co. vs. Piowaty*, 36 F. (2d) 604 (D. C. N. D. Illinois, Judge Woodward); *Fullerton Lumber Co. vs. Chicago, M. St. P. & P. R. R. Co.*, 36 F. (2d)

180 (C. C. A., 8th Circuit, Judge Woodrough); *Pennsylvania R. Co. vs. South Carolina Produce Ass'n,* 25 F. (2d) 315 (D. C. E. D. South Carolina, Judge Cochran); *Johnson-Brown Co. vs. Railroad,* 239 Fed. 590 (D. C. S. D. Georgia, Judge Speer); *C. & N. W. Ry. Co. vs. Stein Co.,* 233 Fed. 716 (D. C. Neb., Judge Munger); *Illinois Central R. Co. vs. Hoopes,* 233 Fed. 135 (D. C. S. D. Iowa, Judge Wade); *D. L. & W. R. R. Co. vs. Nuhs Co.,* 93 N. J. Law 309; *Adams Express Co. vs. Albright Bros.,* 75 Pa. Super. Ct. 410.

Even if the District Court cases denying counter-claim were the law, they could not govern the case at bar. For here we do not have a counter-claim for an injury to the shipment, or for some negligent delay or other act or omission affecting carriage of the goods. Here we have a counter-claim for a negligent act of the carrier in dealing with a check, the very purpose of the delivery of which was the payment of the freight charges. The achievement of that purpose was defeated only by the act of the carrier in failing to make proper and timely presentation of the check for payment.

In *Wells Fargo & Co. vs. Cuneo,* 241 Fed. 727, decided in the District Court for the Southern District of New York, Judge Mayer said:

> "The provisions of the act in question were never intended to deprive a shipper or consignee of his lawful remedies against the carrier for such breaches or wrongful acts as the carrier may have committed."

Some confusion in the decisions may have been originally caused by an Interstate Commerce Commission Ruling, Number 48, but this ruling has since been withdrawn.

Plain justice would seem to require that a shipper, who has a valid claim against a carrier for wrongful act and

negligence in dealing with a check delivered and accepted in payment of freight charges, be not subjected to the expense, trouble and delay of bringing a separate and distinct and different action against the carrier and be precluded from right of set-off therefor in an action for the freight charges. There is no just reason for requiring such circumlocution, and enforcement of the policy of the Interstate Commerce Commission to prevent discrimination in freight charges does not necessitate any such requirement.

The wrongful acts and the negligence of the respondent are plainly evident in the record herein. That the loss is complete and equal to the full amount of the check is also clearly shown (R. 43-44; 49). To require petitioner to bring a separate action against respondent, go to the expense and difficulty of bringing witnesses to Minneapolis, and go through all of the different operations of a lawsuit a second time, when the evidence and the facts to be shown by that evidence would all be identical with the evidence and the facts already produced and shown and embodied in the record herein, would amount to nothing but a hardship and impediment placed in the way of obtaining substantial justice, an added obstacle to the placing of the loss in this case where it belongs, namely, upon the respondent railway company.

Therefore, we submit that if to any extent the views of the courts below as to the effect of Interstate Commerce Commission Conference Ruling Number 207 are to be adhered to, then, at all events, a new trial should be granted, with permission to interpose counter-claim in this very action, so that, under the situation then prevailing, there may be full opportunity to achieve the result which the trial court himself appears to have had originally in mind, namely, that the ultimate loss should nevertheless fall upon the respon-

dent railway company, whose wrongful act has caused it. We do not adhere to the views of the lower courts regarding the effect of the Interstate Commerce Commission Conference Ruling Number 207 upon a case such as we have at bar, and we do not in any respect recede from our view that, upon the merits of that proposition, the decision should be in favor of petitioner. But we do here submit that even if the views of the courts below on that issue were to be adhered to, nevertheless the essence of their views is that the ultimate loss should fall upon the railway company. And the petitioner herein should not be compelled to first give the carrier what it seeks in this action and then be put to the hardship of bringing an entirely separate action to recover something back, if it be possible, against the determined opposition of the railway company.

XI.

The Dictates of Substantial Justice and Fair Dealing Require a Decision in Petitioner's Favor.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The trial court himself did not look with favor upon the position which the railway company takes in this case. The carrier substantially admits that its neglect and wrongful act is the sole cause of the loss. Even if it did not admit it, there could not be any differences of opinion on that issue as the evidence stands in the record in this case. It would have been a simple matter for Mr. Yarosh to have obtained the currency or the gold and silver from the bank and have delivered it to Gustafson, had Gustafson so required. But Gustafson never made any such demand and the whole course of dealing between the parties, as far back as 1922, indi-

cated that the carrier never intended to make any such requirement. Gustafson himself admits that "had we known what was going to happen, we could have probably avoided this trouble" (R. 72). Whose fault was it that currency was not obtained? Why didn't Gustafson, having accepted the check, take the trouble to walk two blocks up to the bank, immediately upon his acceptance of the check, and procure the currency or the coin? He then could easily have done it and Yarosh could not well have done it because the check for the money was out of his possession.

In such a situation, for the railway company to now seek to place the burden and the loss upon the petitioner is unjust and inequitable.

Respectfully submitted,

STANLEY S. GILLAM,
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Minneapolis, Minnesota.

APPENDIX.

Reply to Statement by Letter Addressed to the Court by Counsel for Respondent.

We have received a carbon copy of a letter addressed by Mr. F. W. Root, attorney for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, resident at Minneapolis, dated August 18, 1930, reading as follows:

> "This is to advise the Court that after the petition for Writ of Certiorari was filed in this proceeding, an amount equivalent to that required by the judgment in the Court below was paid by the Petitioner to the Railroad Company and the latter gave to the Petitioner a satisfaction of said judgment; that the retention of said payment and the filing of the satisfaction were contingent upon the decision of this Court; that it was understood that said satisfaction would not be filed until after the decision by the Court and would then either be filed or returned consequent upon such decision; that it was understood and agreed between the parties that the payment of said monies and the giving of such satisfaction should in no way prejudice the appeal in this proceeding; that thereafter the decision in the case of *Little vs. Bowers*, 134 U. S. 547; 10 Sup. Ct. 620, was called to the attention of the parties; that this letter is written merely for the purpose of informing the Court of the exact facts and circumstances and thereby discharging our duty in that regard in the manner indicated in the Little case.
>
> It is not our desire, however, to prevent a decision by this Court in this proceeding on the important questions which the issues present and it will not be our pur-

pose to move a dismissal on the grounds above alluded to. We are in agreement with the position of the Petitioner that a determination of the issues involved is desirable and will be a guidance to the profession that will tend to minimize litigation.

Copy of this letter is sent to the attorney for the Petitioner."

The arrangement mentioned in Mr. Root's letter was originally initiated by him and we entered into it in good faith upon the express condition that it was not to prejudice in any respect the prosecution of the appeal or the rights of the Fullerton Company in bringing that appeal to a final decision in this Court. We had then no knowledge or intimation of the existence of the case of *Little vs. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, or of any rule of law or decision of similar import or one which might raise any question as to the propriety of such an arrangement. There was in fact no collusion or intent of collusion in the arrangement we made and no intent to affect the genuineness of the controversy in any respect whatsoever.

After the Petition for Writ of Certiorari had been granted, and on or about April 10, 1930, members of Mr. Root's office communicated with the undersigned and suggested, for the first time, that there might be some question about the propriety of the arrangement we had entered into, and requested a conference. At such conference, they produced the case of *Little vs. Bowers* and other authorities and requested that I examine these authorities and let them know what should be done about the matter. They stated that they recognized that an essential part of the agreement was that it was to be without prejudice to our appeal or to our rights in the matter, and that they intended to honor that agreement,

but that, in view of *Little vs. Bowers,* they thought that the whole matter should be set before the Court.

We thereafter read *Little vs. Bowers* and the other authorities which counsel for the railroad company had submitted, and endeavored to find further light on the question. We gave the matter as thorough consideration as we could, for, as put to us by the attorneys for the railroad company, the question had two important aspects: (1) The duty of attorneys to this Court to put the matter fully before the Court when question about it arose; (2) The obligation of counsel for the railroad company to carry out in deed and in word the agreement that the arrangement entered into was not to prejudice in any manner or form the rights of the Fullerton Company on appeal to this Court, and the duty of its counsel toward his client to see that no prejudice in prosecution of the appeal did in fact result to the Fullerton Company.

From this consideration of the problem as put to us by counsel for the railroad company, we came to the conclusion that the matter should be treated as equity might treat an agreement vitiated by mutual mistake or other factor rendering an agreement voidable, and stated that conclusion to Mr. Root and his associates, namely: (1) That the arrangement entered into should be rescinded, we to deliver back to him what we had received and they to return to us what they had obtained; (2) That we should then draft and execute a joint statement to be sent to this Court, setting forth fully what we had done. We formally offered to counsel for the railroad company to deliver back to the railroad company what we had received and to fully carry out our part in such a handling of the matter, our purpose being to make clear against any possible question, what we knew to be the fact, that there had been and was no intent

on either side to affect the merits, the genuineness, or the reality of the controversy in any manner whatsoever.

To our surprise, after communicating with their Chicago office, counsel for the railroad company refused to accede to our views, and refused the offer we made to them. No reason for such refusal was then given or has since been afforded to us.

Counsel for the railroad company thereafter showed to us a draft of a statement of the matter which they proposed to send to this Court, substantially in the form sent on or about August 18, 1930. They stated that they were willing to have us join in this statement, but that they did not see their way to change it in any substantial particulars. We gave the matter further consideration, for we then thought and still believe that under the circumstances a statement of such a matter, in fairness to both sides, should be a joint one. We concluded that protection of the rights of the Fullerton Lumber Company was incompatible with accession on our part to the proposals of counsel for respondent. Accordingly, after giving us notice, counsel for the railroad company acting alone sent to this Court their statement dated August 18, 1930.

We cannot agree that that statement fully gives the facts. It does not (1) show what the circumstances were under which the Fullerton Company paid to the railroad company "an amount equivalent to that required by the judgment in the Court below" and (2) it wholly omits to state what the railroad company paid to Petitioner, and that whatever was done was done at the instance of Mr. Root.

The facts are these:

On behalf of the Fullerton Lumber Company, the losing party in both lower courts, we filed our Petition for a Writ

of Certiorari with the clerk of this Court on February 14, 1930. On February 18, 1930, and before service of this Petition had been made on counsel for the railroad company, Mr. F. W. Root, head of the Minneapolis branch of the legal department of the Milwaukee, telephoned an officer of the Fullerton Company requesting a conference to consider this check controversy. Such a conference was arranged and, at the request of the Fullerton Company, the undersigned was present. At that conference, Mr. Root stated that he spoke for Mr. Dynes, general solicitor at Chicago. He then proceeded to make in substance the following proposal:

> "Mr. Dynes, general solicitor of the railroad, has suggested to me that if possible we resolve our difficulties about this check case to such extent as we can at this time, and on behalf of the Milwaukee, we offer to pay you the sum of $375.96, the amount of the original freight bill, plus interest, which would be the outside amount you might be able to collect from us, as damages for alleged mishandling of the check, provided that you pay to us in return therefor the full amount specified in the judgment in the Circuit Court of Appeals. We hope that you won't prosecute your appeal further if we do this, but we won't insist upon that, and this will save you from bringing a separate counter suit against us under the proviso in the Court's opinion allowing you to do so."

In response to this proposition, Mr. Curtis, secretary of Fullerton Lumber Company, stated that it appealed to him because it obviated the expense and trouble of a separate suit for damages which the decisions below left open to his company. He refused, however, to accept it unless it met with the approval of the undersigned, as attorney for his company.

Mr. Root then stated again that he hoped we would not wish to press an appeal. I stated, however, as attorney for the Fullerton Company, that we had just filed our Petition for Certiorari and that we would hardly wish to enter into any arrangement now to dismiss our appeal, although we would consider it, but if he would agree that it was to be absolutely without prejudice to our prosecution of our appeal to the Supreme Court, then I would approve his proposed arrangement on the ground that it obviated bringing the separate suit allowed to us by the courts below in the event that their decisions were affirmed. Mr. Root stated that he would so agree. His proposal was then agreed to and carried out. He delivered to the Fullerton Company a check drawn by the Milwaukee Railroad, payable to the Fullerton Company, for $458.67, being $375.96, the amount of the original check, plus interest to February 20, 1930, together with a satisfaction of the judgment and the Fullerton Company delivered to Mr. Root for the Milwaukee its check for $524.72, being the amount of the judgment plus interest.

Our Transcript, Petition for Writ of Certiorari and Brief, and Notice of Filing in this Court, were later served on Mr. Root on the afternoon of February 18, 1930.

It was the understanding of the Fullerton Company thereafter that its rights on appeal were fully protected, and that it had the following alternatives: (1) It could file the satisfaction and dismiss the Petition to this Court, and be under no further liability; (2) It could go on with its appeal and, in the event the Petition for Certiorari was denied, pay to the Milwaukee Railroad such further amount as would be required by the judgment thereafter entered; (3) In the event that Certiorari was granted by this Court, it could prosecute the appeal on its merits, and such further payment, following the final decision, would be made by either

side to the other as would be required to settle the amount then due.

It was clearly the understanding that the payments agreed to on February 18th were not to be final on either side if the Fullerton Company chose to go on with its appeal. There was no detailed written agreement covering the matter, but the understanding was clear that, if the Fullerton Lumber Company decided not to prosecute its appeal any further, then the February 18th arrangement was final. But if the Fullerton Lumber Company decided to go on with its appeal, then the appeal was to go on without prejudice of any kind, and, depending upon the final decision of the Supreme Court of the United States, the controversy was to be ultimately settled by such additional payment to be made by either side to the other as should be required by the terms of the final decision of this Court.

We promptly notified Mr. Root that the Fullerton Company would go on with its appeal to this Court, and counsel for the railroad company duly filed their brief in opposition to the Petition for Certiorari.

On March 17, 1930, this Court granted our Petition for Writ of Certiorari, and a few days later we learned that this Court had decided the case of *Chicago & Northwestern Railway Company vs. Lindell,* 281 U. S. 14, on February 24, 1930, favorably, as we think, to our contentions on the counter-claim point.

Nothing further was said or done by either side with respect to the arrangement entered into on February 18, 1930, for more than six weeks thereafter, until, on or about April 10, 1930, the question was first raised by counsel for the railroad company of the propriety of that agreement, and whether the controversy had not been thereby made a moot case.

We can state for the Fullerton Company, Petitioner herein, that at no time was it ever intended to make this case a moot one, or to affect in any way the genuineness and the reality of the controversy, that the arrangement entered into on February 18, 1930, was not a final settlement of this controversy, that we did not abandon our rights of appeal, and that our only purpose in entering into it was to avoid the expense and difficulty of a separate action for damages in the event that the ultimate decision should be against us and the decisions below be affirmed.

Respectfully submitted,

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Attorney for Petitioner,
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Minneapolis, Minnesota.

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CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

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FULLERTON LUMBER COMPANY,

Petitioner,

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CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

INACCURACIES IN RESPONDENT'S STATEMENT OF THE CASE.

The respondent's statement of the case is, we think, in certain respects, inaccurate and incorrect, so much so that it seems to us to be misleading.

1. On page 2 of their brief, counsel for respondent say:

> "In paragraph IV of its answer the defendant denied that the shipment was duly transported and alleged that the plaintiff-respondent was negligent and caused loss and damage and further alleged that said loss and damage was paid by the plaintiff (R. 5), that is, the petitioner, when suit was commenced, conceded that *any* claim for loss or damage that they sustained on this shipment had been paid." (Italics ours.)

This is the first time in this litigation, either in the trial court or in the Circuit Court of Appeals, that counsel for respondent have seen fit to make that statement. A reading of the answer will show how unsound and unwarranted the statement is. The obvious inference which counsel now, for the first time in this litigation, seek to draw, is that defendant-petitioner referred in paragraph IV of the answer to loss and damage due to respondent's mishandling of the check. That is untrue. It refers to negligence in the manner of carriage, and paragraph VI of the answer states how payment for that improper carriage or of the improper overcharge was made. What is referred to, of course, is either the incorrect weighing of the shipment or carriage thereof in such manner that it was subject to be heavily rained on, for which a claim was filed and duly paid by the railroad company, for refundment of freight, at a time when the only payment of freight it had received was by the check in controversy (R. 35). That the railroad company made such refundment was not only a recognition of its liability to refund, but was likewise a recognition by it, long after June 19, 1926, that the freight bill had actually been paid and, therefore, a refundment of charges was proper to be made. It was a recognition of the fact that long after June 19, 1926, the carrier did have something out of which to make a refund. There is no warrant for counsel's use of the word "any" in an attempt to make paragraph IV of the answer cover what it does not cover.

The complaint (R. 3-4) declared that defendant-petitioner was indebted to plaintiff in the sum of $375.96 with interest from June 16th, 1926, for freight charges on the shipment in question. The answer specifically and generally denies this (paragraphs VI, VII, R. 5-6). Respondent's reply thereto alleges fully the circumstances surrounding the giv-

ing and receipt of the check in question, and states (paragraph I):

> "That said check was duly presented to the Lumbard State Bank, the bank upon which said check was made, and said bank refused payment upon said check" (R. 7).

Delivery of the check drawn by defendant and made payable to the railroad company, to its Kimball agent, having been, in the reply, alleged and conceded (R. 7), the issues were narrowed to the question whether it was the fault of the shipper or the railroad company "that they have never received any money whatsoever on said check" (paragraph II of the reply).

Of course it was incumbent upon the railroad company to show that it dealt properly with the check, and its counsel therefore affirmatively alleged due presentment to the drawee bank. It was incumbent upon the railroad company to affirmatively prove that allegation.

2. At page 3 of their brief, respondent's counsel seek to make out that petitioner knew that the bank was shaky, by attempting to draw their own inference to that effect from the fact that petitioner had an account there. Not only is this attempted inference unsound in and of itself, not only is it not supported by any evidence in the record, but it is directly contrary to the positive proof that the Fullerton Company and its agent, J. E. Yarosh, had no knowledge that the bank was shaky, continued to make deposits and draw and deliver checks thereon up to the moment of closing, and, in fact, so far trusted the bank that they took a draft drawn upon its credit the day before the bank closed (R. 38, 40, 42-43). Mr. Yarosh, for petitioner, positively testified:

> "Q. Did you have any knowledge up to the day it closed of a likelihood that this bank would close?

A. I didn't.

Q. You did business with it on the same basis that you had always done?

A. Yes.

Q. You made this deposit of $286.88 (on June 23d) and drew checks in the usual course of business? That is a fact, is it?

A. Yes, sir" (R. 45).

In the light of this and other uncontradicted testimony, and in the light of the further fact that, upon a duly served motion for amended findings, the trial court amended his original findings so as to state that the respondent alone was aware that the Lumbard State Bank was not in good financial circumstances at the time of execution of the check (R. 54-55), striking out the words "and defendant" from the original finding, it seems to us that the effort of counsel for respondent to make, in their statement of the case, the contrary appear (Respondent's Brief, page 5, third paragraph from bottom of page), is not only highly unsound, unwarranted by anything in the evidence, but, even more, is a direct attempt to challenge now the final finding of the trial court on the point, a finding that now binds all parties and conclusively establishes the fact.

3. At page 4 of their brief, counsel for respondent say:

"The proof showed that petitioner had a bank balance in the Lumbard State Bank sufficient to pay the check in question but there is no proof that the bank had cash on hand on June 19th or any subsequent date sufficient to pay the check of $375.96."

No citations to the record are made by respondent's counsel in connection with this statement. The proof in the

case is not merely that at all times Mr. Yarosh kept, continuously, sufficient funds on deposit at the bank to cover outstanding checks (R. 38). It goes further. The testimony shows that Mr. Yarosh dealt with the bank in the regular way, made deposits, drew checks, in due course of business, up to the hour of closing (R. 40, 42). Whatever checks he had occasion to present to the bank (and he did present one on June 24th), were duly and promptly honored and paid (R. 42). It is purely an assumption by counsel when they seek to conjecture that possibly the check in the case at bar would not have been paid if promptly or properly presented for payment to the drawee bank. And there is one item of positive and uncontradicted proof in this case which, we think, wholly negatives these attempted conjectures and inferences: the fact that the bank continued open and doing business in the regular way until noon of June 25th, 1926 (R. 26; 45).

A bank undertakes that it will pay out the funds deposited with it as ordered by the depositor; the depositor's right to withdraw his deposit is absolute and the bank is bound to honor his checks when properly drawn and presented for payment; any failure, refusal or neglect to honor and pay immediately all proper orders (checks), to pay out deposits constitutes a wrong and amounts to insolvency, warranting and requiring closing of the bank forthwith by the proper authorities (see *Armstrong vs. American Exchange National Bank*, 133 U. S. 433, 464, 466; *Compiled Laws of South Dakota*, 1929, Sec. 8999, providing that "A bank shall be deemed to be insolvent * * * when it is unable to meet the demands of its creditors in the usual and customary manner * * *"; and Sec. 8925, providing that the Superintendent of Banks shall forthwith take possession of the property and business of any bank which shall "refuse to make payment of

its obligations"; *United States vs. Oklahoma*, 261 U. S. 253; *National Bank vs. Insurance Company*, 104 U. S. 54, 64; *Cunningham vs. Merchants' National Bank*, 4 F. (2d) 25, 29-30 (C. C. A., First Cir.); *Dodge vs. Maxtin*, 17 Fed. 660, 664 (Cir. Ct. W. D. Missouri, 1883); *Federal Reserve Bank of San Francisco vs. Idaho Grimm Alfalfa Growers' Assn.*, 8 Fed. (2d) 922, 927 (C. C. A., 9th Cir. 1925); *State vs. Stevens*, 16 S. D. 309, 320, 92 N. W. 420, 424; *State vs. Allen*, 240 Mass. 394, 134 N. E. 401, 20 A. L. R. 1203; *Castaline vs. National City Bank of Chelsea*, 244 Mass. 416, 138 N. E. 398; 7 *Corpus Juris* 672; 727; 1 *Morse, Banks and Banking*, 6th Ed., Secs. 311, 453, 458).

In the absence of evidence to the contrary it is to be presumed that a bank, which is open and receiving deposits in regular course of business, is solvent and able to pay orders to pay drawn on deposits (that is, checks) whenever such orders are properly presented at its counter for payment (*Sherman vs. Smith*, 185 Iowa 654, 667, 169 N. W. 216, *Mason City Brick & Tile Co. vs. Lamson*, 190 Iowa 365, 379, 180 N. W. 314 (which shows also that there is a like presumption that state officers do their duty and do not allow continuance of business if the corporation is not solvent); *Caldwell vs. City of Ottumwa*, 198 Iowa 666, 672, 200 N. W. 336; *Webb vs. Town of Eutaw*, 9 Ala. App. 474, 63 Southern 687; *Wallace vs. Hull*, 28 Georgia 68; 1 *Jones, Evidence*, 2nd Ed., page 425, Sec. 260; page 449, Sec. 273).

But the statement made by respondent's counsel is, we think, unwarranted. There is proof in this record that the check would have been promptly paid if properly presented: the statements of the two men best qualified to know the facts: Messrs. Yarosh and Gustafson, the local agents of the parties involved. Yarosh testified that he first learned on June 29th that the check had not been paid by the bank

and he immediately saw Gustafson and, when Gustafson told him that he had sent the check in to Chicago because he did not want to embarrass the bank he then told Gustafson:

> "Why didn't he say something, I could have got him the cash from the bank" (R. 38).

And Gustafson wrote to the Fullerton Lumber Company,

> "of course had we known what was going to happen we could have probably avoided the trouble" (R. 72).

They could have "avoided this trouble" or "have got him that cash" only by means of the cashing of a check at the bank and obtaining currency there at Kimball. They were both dealing with this bank every day; they were the ones who knew that the bank was honoring in regular course all checks duly presented to it up to the hour of closing. The conjectures of counsel as to the ability of the drawee bank to honor the check up to the moment of closing are refuted by the local men who knew. At all events, the statement that there is no proof in the record to the contrary is not true.

And, in any event, there was one, and only one, proper way to ascertain whether the Lumbard Bank had funds on hand with which to honor this check, and that way was to present the check at its counter for payment. Unless and until that was done, no one has any right to say that the check would not have been honored and paid. The law is settled, as we have seen, that it was the duty of the respondent to make such presentment for payment (Petitioner's Main Brief, Secs. IV, V; *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37 (1904).

4. At page 4 of respondent's brief counsel say:

> "The record does not show if the Federal Reserve

Bank held the check in its bank or whether it forwarded it to the Lumbard State Bank. As it was collectible at par through the Federal Reserve Bank at Minneapolis, it may have been retained in that bank."

Such a conjecture has not the slightest proof in the record to support it, and it was incumbent upon respondent, and was not incumbent upon us, to prove what the railroad company and its collecting banks or agents did with the check after it received it. The respondent *alleged* "that said check was duly presented to the Lumbard State Bank, the bank upon which said check was made, and said bank refused payment upon said check" (R. 7). Then, in proof of this allegation, John Dickie, assistant treasurer of the Milwaukee and in charge at the time of such matters, testified as to the method they used in handling the check:

"A. Well, it was endorsed over to the Federal Reserve Bank, the date is, apparently, June 22, by the Central Trust Company of Illinois, and on June 23, was endorsed to any bank or banks by the Federal Reserve Bank of Minneapolis. They would send it out then to the Lumbard State Bank for payment. Evidently when it arrived at Kimball the bank was closed on which it was drawn and it was returned to the Federal Reserve Bank and back to the Central Trust Company.

Q. Why was the check sent to the Federal Reserve Bank at Minneapolis?

A. Because Kimball, S. D., is in the Fourth Federal Reserve District.

Q. At least at that time, Kimball was in the district of the Federal Reserve Bank of which Minneapolis was the head?

A. Yes.

Q. Was it handled then in the usual way that checks are handled.

A. It was" (R. 31).

This was the testimony as to what happened to the check, given by the official or agent of the carrier who caused it to be sent to the Central Trust Company at Chicago and then on to the Federal Reserve Bank at Minneapolis. Presumably, he knew what he was doing and why, and where the check would go in usual course of collection from the Lumbard State Bank of Kimball. No other bank could or would pay it because it was not drawn on any other bank. First Gustafson and then John Dickie were the only persons who had power over the check after it left Mr. Yarosh's hands about 2:15 P. M. on June 19th, 1926, and only they could determine where it should go, until the check was produced by them at the trial of this case on November 13, 1928. It was never in the meantime tendered back to us (R. 52) or in any way in our possession or control. Those who possessed and controlled the check during all of this time surely ought to know what they did with it and where they sent it.

The argument and inferences of counsel in their remarks contained in their statement of the case on this point do violence to the limited statutory powers of the Federal Reserve Banks as collecting agents engaged in receiving checks from correspondents and causing such checks to be presented at the proper drawee banks for payment at par without discount (see *American Bank & Trust Co. vs. Federal Reserve Bank of Atlanta*, 256 U. S. 350; *American Bank & Trust Co. vs. Federal Reserve Bank of Atlanta*, 262 U. S. 643, affirming 280 Fed. 940).

Counsel's statement regarding this check, "as it was col-

lectible at par through the Federal Reserve Bank at Minneapolis, it may have been retained in that bank" (brief, page 4), is not only a gratuitous conjecture without support in the record, but is contrary to the universal customs and methods of banks acting as collecting agents and, had the Federal Reserve Bank of Minneapolis thus retained this check without making proper and timely presentment of it at the drawee bank, it would have rendered itself liable to the Central Trust Company of Illinois or to respondent (*Federal Reserve Bank of Richmond vs. Malloy*, 264 U. S. 160, affirming 291 Fed. 763, which affirmed 281 Fed. 997).

At page 5 of their brief counsel for respondent say, "The check, of course, when it was refused, was returned to the Treasury Department of the railroad." By whom was it refused, if not by the Lumbard State Bank of Kimball?

At all events, if the statement of respondent's counsel on this matter be true, then respondent has not made out the elements of the cause of action herein pleaded, and cannot recover. The burden of showing a proper presentment of the check at the drawee bank for payment was upon respondent.

Reply to Respondent's Assertion That Certain of Our Statements of Fact Are Unsupported by the Record.

With respect to the matter of date of presentment of the check in controversy (Respondent's Brief, page 6) if, of course, the check was never presented for payment at the Lumbard State Bank of Kimball, and counsel for respondent wish to stand on that assertion, we are content to have it so. We then will have a case where the holder of a check never properly presented it for payment as the law requires.

But if, as John Dickie at least attempted to testify (R.

31), the check was in fact presented for payment, through banking channels, to the bank upon which it was drawn, the slip referred to on page 6 of respondent's brief at least shows that payment of the check was refused for the reason that the bank was closed at time of presentment. We were under the impression, at the trial, that the Federal Reserve Bank had attached a slip to this check showing the date we mentioned, but we are not sufficiently sure at this late date of that matter to stand on it. We do know that the man most vitally concerned in promptly knowing the fact of dishonor, Mr. Yarosh, local agent at Kimball, of the Fullerton Lumber Company, was not notified thereof until June 29th, whereupon he promptly sought out the railroad agent Gustafson and proceeded to question him regarding it (R. 38).

There is nothing in the record to warrant the statements of counsel for respondent (page 7 of their brief) as to the time required for transmission of the check from the Minneapolis Federal Reserve Bank to the Lumbard State Bank of Kimball. Since our statement was questioned, we have endeavored to check up on the matter, and have ascertained from those in charge at the Minneapolis Federal Reserve Bank that Kimball is on a four day schedule (for the importance and accuracy of Federal Reserve Bank time schedules, see *Pascagoula Nat. Bank vs. Federal Reserve Bank of Atlanta*, 3 Fed. (2d) 465), two days out and two days in. There is no mail delivery at Kimball by carrier, and in June, 1926, there was but one mail each way, the arriving time of the train from the east being about 3:00 P. M. If the letter containing the check in question was able to catch an evening train on June 23rd from Minneapolis, it probably arrived at Kimball on the afternoon of June 25th and was opened by the examiner in charge on Saturday, June 26, but if it did not

actually leave Minneapolis until the morning of June 24th, it would not in due course have arrived at Kimball until late in the afternoon of Saturday, June 26th, and have been opened on Monday, the 28th. After this bank closed, the examiner in charge had two closed banks on his hands at Kimball. He was required to at once inventory the Lumbard bank. We have ascertained from him that he had very little help in this and was required to take over the bank on short notice. He thinks that he returned this check by letter on June 29th, and did not receive it until the morning of that day. The Federal Reserve files which would establish the dates have been destroyed.

The other matters referred to on pages 5 to 8 of respondent's brief we do not deem it necessary to discuss. If respondent wishes to plant itself on the legal premise that an individual accepting delivery at Kimball of a check drawn on a Kimball bank is at liberty to send the check traveling around the country, depending upon the accidental matter of where the payee happens to have a bank account or bank accounts (if it keeps accounts at more than one point), then we have nothing further to add.

In this connection we submit that the attempt to justify sending the check on a journey of approximately fourteen hundred miles around through Chicago and Minneapolis by the words, "Collectible at par through the Federal Reserve Bank at Minneapolis," is really an afterthought and that, at the time the check was so sent, these words had nothing to do with the matter. Gustafson testified to circumstances wholly other than these words as being the reasons for his sending the check to Chicago (R. 18, 22, 28), and Dickie testified that it was his knowledge of the shaky financial condition of the bank which induced him to instruct Gustafson to send checks in to Chicago (R. 32-35; see Exhibit 4,

page 73). There is no intimation in any of this testimony of the agents of the railroad company that the words, "Collectible at par through the Federal Reserve Bank at Minneapolis," had anything to do with the original handling of the check. There is no proof in the record that Dickie knew such words were printed on the Lumbard Bank checks. All prior payments by checks bearing these words had been made in Kimball and the checks had been cashed in Kimball and stayed in Kimball (R. 23-25; 57-72).

THE VALIDITY OF PAYMENT OF FREIGHT BILLS BY MEANS OF CHECK HAS BEEN HERETOFORE RECOGNIZED BY BOTH THE RAILROAD COMPANY AND THE INTERSTATE COMMERCE COMMISSION.

There are certain features of this case which may well be borne in mind in connection with respondent's argument against the propriety of the use of checks in remitting payment of freight bills.

At the top of the original freight bill in this case (R. 56), which is the bill which respondent's agent delivered to Mr. Yarosh and duly receipted at the time the check in controversy was delivered, are these words:

> "Make checks payable to Chicago, Milwaukee & St. Paul Railway, H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers."

These words were, it seems to us, a specific direction to the Fullerton Company to make payment of the bill by check. In giving the check involved in the case at bar to Mr. Gustafson, the railroad company's agent, Mr. Yarosh, for the Fullerton Company, merely followed specific directions printed on the bill itself. After having given such directions to the shipper on its own freight bill, it seems to

us now highly unsound for counsel for the carrier to argue that giving of the check was unauthorized.

That the Interstate Commerce Commission has specifically recognized the propriety of payment of freight bills by check is shown by its order in *Ex Parte 73*, at page 55 of respondent's brief. Paragraph 5 thereof in part provides:

> "5. The mailing by the shipper of valid checks, drafts or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. * * *"

It seems to us that this ruling of the Interstate Commerce Commission, handed down June 4, 1930, is a conclusive answer to the argument made by respondent and to the argument contained in the opinions below on the question of the use of checks.

BOTH ATTORNEYS FOR RESPONDENT PARTICIPATED IN THE CONFERENCES NARRATED IN THE APPENDIX TO PETITIONER'S BRIEF, AFTER THE ARRANGEMENT WAS ENTERED INTO.

The arrangement discussed in the Appendix to our main brief was initiated by Mr. F. W. Root, acting alone (pages II, V). Mr. Root is general solicitor at Minneapolis, as we understand it, and Mr. A. C. Erdall is his assistant, having an office next adjoining Mr. Root's and generally assisting him in the conduct of litigation. It was Mr. Erdall who, as a member of Mr. Root's office, communicated with the writer on or about April 10, 1930, and raised, for the first time, a question about the propriety of the arrangement entered into with Mr. Root. At the conference in Mr. Root's office, held at that time at his request, Mr. Erdall was pres-

ent and participated therein, and produced the cases and authorities, and discussed them in the writer's presence. He was present at some, although not all, of the later conferences held in Mr. Root's office. Mr. Root stated to Mr. Erdall, in the writer's presence, that the arrangement between counsel for the respective parties had been entered into on condition that it was to be without prejudice to our right of appeal if we chose to go on with it. It was Mr. Erdall alone who called the writer on the telephone two or three weeks afterward, stated that he was going to Chicago that night to see Mr. Dynes, and requested that I come to the Milwaukee station for a conference with him. I did so, and it was at that conference that we formally offered to Mr. Erdall to rescind the transaction. He agreed to carry that offer to Mr. Dynes, and presumably did so. He was present with Mr. Root at some conferences held after that date, although not at all of them.

In this connection the following cases are of value: (*Dakota County vs. Glidden*, 113 U. S. 222; *Mills vs. Green*, 159 U. S. 651, 654; *United States vs. Trans-Missouri Freight Assn.*, 166 U. S. 290, 308; *Illinois Central Railroad Company vs. Adams*, 180 U. S. 28; *Tennessee vs. Condon*, 189 U. S. 64; *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S. 498; *Gulf, Colorado & Santa Fe Railway Company vs. Dennis*, 224 U. S. 503).

Respectfully submitted,

STANLEY S. GILLAM,
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Minneapolis, Minnesota.

FILE COPY

MAR 12 1930

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 47

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PETITION SHOULD BE DENIED.

(Italics appearing throughout brief my own.)

The petition should be denied because the United States Circuit Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota correctly decided the questions involved in accordance with the applicable decisions of this Court and no substantial questions are presented to justify the granting of a writ herein.

Official Report of Opinion in the Court Below.

Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 36 Fed. (2) 180.

STATEMENT OF THE CASE.

Certain facts in addition to those set out by petitioner may be helpful.

Action was commenced in the United States District Court, District of Minnesota, Fourth Division, by H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the Chicago, Milwaukee & St. Paul Railway Company, to recover certain unpaid freight charges, amounting to $375.96, due respondent from petitioner for transporting a carload of coal from Norfolk, West Virginia to Kimball, South Dakota.

By stipulation of parties the Chicago, Milwaukee, St. Paul & Pacific Railroad Company was substituted as plaintiff in that action in place of the Receivers, after the discharge of the Receivers.

The car of coal was unloaded, and released by the petitioner at said Kimball on June 19, 1926 (R. 16). The freight bill was presented to petitioner's agent between 2:00 P. M. and 3:00 P. M. on said June 19th (R. 16). Respondent's agent received a check from petitioner's agent (R. 16) drawn on the Lumbard State Bank of Kimball, payable to the Chicago, Milwaukee & St. Paul Railway Company, in payment of freight charges in question, which contained on the face thereof the printed notation: "Collectible at par through the Federal Reserve Bank at Minneapolis" (R. 55).

On June 16, 1926, respondent's Treasurer wrote to respondent's agent at Kimball that he had noticed by a statement of June 8, 1926, that the cash reserve of the Lumbard State Bank was very low and collections in excess of $500.00 should not be exchanged at the Lumbard State Bank and further advising him that if he felt there was any question about the financial responsibility of the Bank he was to send

his collections direct to the Depository at Chicago (R. 78). The agent at Kimball was further instructed: "Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals" (R. 78).

Respondent had no account in the Lumbard State Bank and petitioner was in a better position than respondent to know the financial condition of the bank (R. 26 and 30). Petitioner got statements from the bank showing the cash balance in the bank, and in a general way knew the condition of the bank (R. 35 and 36). The petitioner was a responsible company (R. 31).

Dickie, the Assistant Treasurer, who actually issued the instructions for the respondent to the Kimball agent, didn't know that many of the shippers had accounts in the local banks (R. 31).

The petitioner had its head offices at Minneapolis, Minnesota. Dickie testified he didn't have sufficient information to advise shippers that respondent felt that the Lumbard State Bank was in financial difficulties (R. 31), but he knew conditions were bad in some twenty-five, thirty or fifty other places in South Dakota and Western Iowa where he had instructed agents to send checks direct to respondent's depository (R. 30).

The proof shows the petitioner had a bank balance in the Lumbard State Bank more than sufficient to pay the check in question but there is no proof that the bank had sufficient cash on hand to pay the check.

Respondent's agent, after receiving the check, put it in his cash drawer at the depot (R. 17) and forwarded it by the first train (R. 36), which was on the next morning, Sunday, June 20th (R. 18) with his other receipts, to his depository, the Central Trust Company of Illinois at Chicago (R. 17).

Upon receipt of the check the Central Trust Company, on June 22nd, endorsed the check for the respondent (R. 27 and 28). The check then went to the Federal Reserve Bank at Minneapolis (R. 28) and was endorsed by that Bank on June 23rd. This latter bank, apparently, sent it to the Lumbard State Bank for payment but it arrived too late to be paid as the Lumbard State Bank closed its doors at noon on June 25, 1926 (R. 23). Petitioner's statement that the check was delayed nine days, so far as we know, is not based on the record. We do know the check was at the Federal Reserve Bank at Minneapolis on June 23rd.

Petitioner did introduce in evidence a large number of checks (R. 59 to 76, incl.) which were paid at the Lumbard State Bank during the years 1925 and 1926. One of these, for $502.70 was paid on June 15, 1926 (R. 59). The next check, one for $50.00, was cashed on June 23rd (R. 36). On June 21st to 23rd a deposit of $286.88 was made in the bank (R. 36 and 37). On June 24th they cashed a check for $20.55 and on the same day got a bank draft for $300.00 (R. 36). The bank draft, apparently, was never paid (R. 37).

Respondent was unable to obtain cash on the check in question and as petitioner refused to pay the freight charges, brought suit in the instant case to recover for the outstanding freight charges.

SUMMARY OF THE ARGUMENT.

(1) The respondent was and is obligated to collect and the petitioner was and is obligated to pay the full freight charges on the shipment involved.

L. & N. Ry. Co. vs. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 495.

(2) The obligation of petitioner to pay the freight

charges had not been performed until they were actually paid in money.

Conference Ruling No. 207, adopted by the Interstate Commerce Commission September 15, 1906.

L. & N. Ry. Co. vs. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 268.

C. I. & L. Ry. Co. vs. United States, 219 U. S. 486, 31 Sup. Ct. 272, 274.

N. Y. C. & H. Ry. Co. vs. Gray, 239 U. S. 583, 36 Sup. Ct. 176.

Lake & Export Coal Corp. vs. C. & O. Ry. Co., 1 Fed. (2) 968.

Pennsylvania Ry. Co. vs. South Carolina Producers Assn., 25 Fed. (2) 315, 317.

C. & N. W. Ry. Co. vs. Wm. S. Stein Co., 233 Fed. 716.

A. J. Phillips Co. vs. G. T. & W. Ry. Co., et al., 236 U. S. 662, 35 Sup. Ct. 444.

Eggleston vs. Plowman, 49 S. D. 609, 207 N. W. 981.

(3) The statement on the check "Collectible at par through the Federal Reserve Bank at Minneapolis" justified the respondent in sending said check to its Depository at Chicago to be sent to the Federal Reserve Bank at Minneapolis for collection.

Spokane Valley State Bank vs. Lutes, et al., 133 Wash. 66, 233 Pac. 308.

(4) A check is not money. In South Dakota a payment by check is a conditional one only.

Legal Tender Cases, 110 U. S. 462, 4 Sup. Ct. 137, 138.

Townsend vs. Swallow, 91 Neb. 564, 136 N. W. 730.

Eggleston vs. Plowman, County Treasurer, supra.

(5) A claim for damages cannot be set up as a counter-

claim in an action to recover interstate freight charges.

Pennsylvania Railroad Co. vs. South Carolina Producers Assn., supra.

C. & N. W. Ry. Co. vs. William S. Stein Co., supra.

Illinois Central Ry. Co. vs. Hoopes, 233 Fed. 135.

Michigan Central R. Co. vs. Carl & W. J. Piowaty, Inc., 36 Fed. (2) 604.

Johnson, Brown & Co. vs. D. L. & W. Ry. Co., 239 Fed. 590.

D. L. & W. Ry. Co. vs. Henry Nuhs Co., 93 N. J. Law 309, 111 Atl. 223.

Oregon, Washington R. R. & Navigation Co. vs. Cascade Contract Co., 101 Oregon 582, 197 Pac. 1085.

ARGUMENT.

The respondent was and is obligated to collect and the petitioner was and is obligated to pay the full freight charges on the shipment involved.

The petitioner wishes to give the impression that the respondent carrier owed the sole duty to see that the check was cashed and that money was received to pay the outstanding freight charges. This is not an exclusive duty or obligation on the part of the carrier but it is a duty which is also owed by the shipper or consignee of the freight. If the Lumbard State Bank actually was solvent on June 19th, the petitioner could have gone to the Lumbard State Bank and obtained cash and turned it over to the Agent of respondent at Kimball in payment of the charges. The record shows that the petitioner's office at Kimball was only two and one-half blocks from the Lumbard State Bank (R. 24).

In *L. & N. Ry. Co. vs. Maxwell, supra*, this Honorable Court brings out the fact that shippers as well as carriers

must see that the proper charge is paid. On page 495, the Supreme Court said:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

The record shows, as previously outlined, that the shipment involved a movement from Norfolk, West Virginia, to Kimball, South Dakota (R. 17). The petitioner, of course, knew that the respondent's line of railroad did not extend to Norfolk, West Virginia, and therefore knew that it, for at least a considerable portion of the aforesaid charges, was merely acting as agent for other railroad carriers and as the respondent for a considerable portion of the charges was the agent only it would seem that the petitioner was presumed to know that the respondent was authorized to receive money only in payment of the charges of its principal.

This Honorable Court has held that a collecting agent is without authority to accept for the debt of his principal anything but what the law decrees to be legal tender or which is by common consent considered and treated as money and passes as such at par.

See *Ward vs. Smith*, 7 Wallace 447, 452, 19 Law Ed. 207.

Federal Reserve Bank of Richmond vs. Malloy, 264 U. S.

160, 68 L. Ed. 617, 44 Sup. Ct. Rep. 296, affirming *Federal Reserve Bank of Richmond vs. Malloy, et al.* (4th Circuit), 291 Fed. 763, and *Malloy vs. Federal Reserve Bank of Richmond*, 291 Fed. 997.

The obligation of petitioner to pay the freight charges had not been performed until the freight charges were actually paid in money.

It is respondent's position that the giving of this check did not constitute a payment of the freight charges for the reason that freight charges must be paid in cash or other legal tender and that until such check was actually cashed and the money deposited to the account of the respondent or the cash received by the respondent, the obligation on the part of the petitioner to pay the charges had not been discharged.

Certain decisions we think are conclusive on this matter and we first call the Court's attention to a rule of the Interstate Commerce Commission adopted by that Commission on September 15, 1906, known as Conference Ruling 207, reading as follows:

> "207. PAYMENT FOR TRANSPORTATION.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

This ruling has been referred to and approved by this Court in the case of *L. & N. Ry. Co. vs. Mottley, supra.* In that case, on page 268, this Court said:

> "In our opinion, after the passage of the commerce act, the railroad company could not lawfully accept from Mottley and wife any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule *were payable only in money.*"

On the same page, the Court further says:

> "*That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings* (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or different compensatjon than the established rates or fares in effect at the time precludes the acceptance of service, property, or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute."

On the same page the Court further says:

> "The statute manifestly means that the *purchase of* a transportation *ticket by a passenger*, and its sale by the company, shall be consummated only by the former

paying cash and by the latter *receiving cash* of the amount specified in the published tariffs."

The United States Supreme Court again went into this matter very carefully in the case of *C. I. & L. Ry. Co. vs. United States, supra.* On page 274 this Court said:

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for *in money*, which has a certain value, known to all, and not in commodities or services, or otherwise than in money."

In *Lake & Export Coal Corp. vs. C. & O. Ry. Co.* (4th Circuit), *supra*, in referring to the Gray case, *infra*, the Court said:

"It was held that he was entitled to demand that sum in money from the railroad, it was not permitted to furnish it to him in transportation. In short, he would have to buy tickets, and it would have to *pay* him what it owed him *in cash*, and not in passes."

See also *N. Y. C. & H. R. R. Co. vs. Gray, supra. Pennsylvania Railroad Co. vs. South Carolina Producers Assn., supra.*

In *C. & N. W. Ry. Co. vs. William S. Stein Co., supra*, the Court said:

"Under the Acts of Congress relating to the transportation of interstate commerce, as construed by the Supreme Court of the United States in *Louisville & Nash-*

ville Railroad Company vs. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, and in *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 286, 31 Sup. Ct. 272, 55 L. Ed. 305, the carriers cannot accept in payment for the transportation of interstate commerce *anything but cash*, and no contract, however fair, looking to the payment for such services by an exchange of commodities can stand."

See also *L. & N. R. Co. vs. Maxwell, supra.*

A. J. Phillips Co. vs. G. T. & W. Ry. Co., et al., supra.

It is the respondent's position that the giving of the check did not discharge the liability of the petitioner for the freight charges until the respondent railway company had received money to cover the charges.

In *Eggleston vs. Plowman, County Treasurer, supra,* a taxpayer gave a draft to the county treasurer in payment of taxes and said treasurer neglected to present the draft to the bank for three weeks. In the meantime the bank failed. The Supreme Court of South Dakota held mandamus would not lie to compel the issuance of a tax receipt for the reason the taxes were not paid until cash had been received by the county treasurer. On pages 981 and 982 the Court said:

"This proceeding is by the property owner himself against the defendant in his official capacity as a county officer seeking to compel the performance of an official duty, namely, the issuance of a tax receipt, which receipt the officer has no right to issue until the taxes are paid. Section 6765, Rev. Code 1919.

"A county treasurer has no authority to accept any-

thing other than money in payment of taxes, excepting in such instances, not here material, as the statute expressly otherwise provides, and in the instant case the treasurer had no right to accept the draft as payment of the tax, and did not in fact undertake or agree so to accept the draft.

"*It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid.*" These propositions are conceded by appellant, but he undertakes to apply to the defendant as a public official the same rule that would obtain between private individuals, and to maintain that the draft, although conditional payment only when offered, yet, having been retained by the defendant instead of being refused and returned, defendant's want of diligence in presenting it for payment operates to extinguish plaintiff's obligation.

"*We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual, whose duty it is under the law to pay his taxes and pay them in money, and a public officer, whose duty it is to collect the taxes and collect them in money.*"

We have the same situation in the instant case that existed in the Eggleston case. In our case freight charges can be paid in cash only and if any other device is used to pay the charges the debt is not discharged until cash is actually received by the railway company for the charges.

The statement on the check "Collectible at Par through Federal Reserve Bank at Minneapolis" justified the respondent in sending said check to its depository at Chicago to be sent to the Federal Reserve Bank at Minneapolis for collection.

The Central Trust Company of Illinois at Chicago was the depository for the respondent. The Lumbard State Bank was not a depository for the respondent.

We believe the case of *Spokane Valley State Bank vs. Lutes, et al., supra*, indicates that this check was handled in at least one of the customary manners of handling checks of this character and we call the court's attention to the following quotation in said opinion, appearing on page 310:

> "There appears to be some contention that it was negligence for the Exchange National Bank to send the draft for collection through the Federal Reserve Bank rather than sending it direct to Billings. The evidence shows that this was in accordance with the custom of banks. If the custom was a general one, as the evidence shows, and was reasonable, the appellants were bound by it, even though it was not actually known to them at the time they placed the certificate of deposit with the respondent for collection, according to the weight of authority, though there are cases holding the other way. The prevailing rule appears to be that the general usage and customs of banks in making collections will bind persons dealing with them in this business, whether such usage or custom be known or not; this upon the theory that, when a person hands over a negotiable instrument to a bank for collection without remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended

course. Either he knows and approves of the ordinary and customary way that collections are handled by banks, or he voluntarily trusts to the wisdom of the bank in handling the matter. He impliedly consents to its collection in the usual and ordinary way."

A check is not money. In South Dakota a payment by check is a conditional one only.

In the *American and English Encyclopedia of Law*, Second Edition, Volume 20, page 837, money is defined as follows:

> "Money is defined as that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, *being accepted equally without reference to the character or credit of the person who offers it* and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities."

In this connection we call the Court's particular attention to Defendant's Exhibit 4 which is a letter from the treasurer of the plaintiff to the agent at Kimball in which he states:

> "Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals" (R. 78).

It is clear, therefore, that this check was accepted because of the good credit of the Fullerton Lumber Company and this and other checks, of course, are dependent upon the

character or credit of the payor and, therefore, are not money.

The following note appears in the *American and English Encyclopedia of Law*, Second Edition, Vol. 20, page 838:

> "In *Wills vs. Allison*, 4 Heisk. (Tenn.) 392, it was said: 'Money, said Sir William Blackstone, "is the universal medium or common standard, by comparison with which the value of all merchandise may be ascertained; or, it is a sign which represents the value of all commodities." 1 Black. Com. 276; Sto. on Con., Sec. 1118. And so it is defined by Lord Ellenborough in 13 East 20; and by Chancellor Kent in *Mann vs. Mann*, 1 Johns. Ch. (N. Y.) 236, to be cash, that is, gold and silver, or the lawful circulating medium of the country—including banknotes, when they are known and approved of, and used in the market as cash.' Standard of Value.—'Money is not only a medium of exchange, but it is a standard of value.' Per Field, J., dissenting, in Legal Tender Case, 110 U. S. 462, 4 Sup. Ct. R. 137, 138."

A check clearly does not come within the definition of money referred to above. It is neither a universal medium nor common standard by which the value of merchandise may be ascertained, it is not a standard of value and its value does depend upon the character and credit of the person who offers it.

In *Townsend vs. Swallow, et al., supra*, in a syllabus by the Court, it is said:

> "A decree for the payment of money means lawful money of the United States; the creditor is not required to receive private checks as a compliance with the decree."

Freight charges on goods moving in interstate commerce can be paid in money or cash only.

In the Elkins Act of February 19, 1903, Chapter 708, see 32 Stat. 847, Section 1, as amended by Act of June 29, 1906, 34 Stat. 584 (Mason's U. S. Code Ann. 1926, Title 49, Secs. 41 to 43), contains the following:

> "And it shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant or give, or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The Interstate Commerce Commission in *California Sugar & White Pine Company vs. Director General, as Agent*, 73 I. C. C. Reports 338, at page 339, said:

> "The Interstate Commerce Act prohibits a carrier from charging, demanding, collecting or receiving a greater or less or different compensation than that specified in its tariffs, and nothing but money can be lawfully

accepted in payment for transportation subject to the act."

See also decision of said Commission in "Payment of Charges in United States Currency," 59 I. C. C. 263.

The payment of these charges took place in the state of South Dakota. The Supreme Court of that state clearly held that payment by a check is not a payment in money and is a conditional payment only and such payment becomes absolute only when the check is in fact paid.

See *Eggleston vs. Plowman, County Treasurer, supra.*

A claim for damages cannot be set up as a counter-claim in an action covering interstate freight charges.

The Circuit Court of Appeals of the Eighth Circuit is the only Circuit thus far to pass upon this question. In the instant case, on page 182, the Court states:

"(2) On the question whether a counter-claim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges, there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the freight charges, and we think this conforms to the intent of Congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burden-

some to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers, the whole intent and purpose of Congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers, the suits would inevitably open the door to gross discriminations under color of counterclaims and offsets which the courts could not prevent. In fact, a measure of discrimination is present as soon as a counter-claim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counter-claims or offsets and then they cannot be adjudged to pay their freight charges until all such matters of counterclaim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash, but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of Congress to abolish them all is clear. The Federal Courts are also bound to the same purpose, and, as the practice of permitting counter-claims in these suits tends to defeat the purpose, the practice should not be permitted even though there is a statute of the state sanctioning counter-claims generally in law actions."

Many other well reasoned decisions support the conclusion

reached by the Circuit Court of Appeals in the foregoing quotation.

See *Pennsylvania Railroad Co. vs. South Carolina Producers Assn.* (D. C. Eastern Division of South Carolina), *supra.*

Michigan Central Railroad Co. vs. Carl and W. J. Piowaty (D. C. N. D. Ill. E. D.), *supra.*

Illinois Central Ry. Co. vs. Hoopes (D. C. Southern Dist. of Iowa), *supra.*

C. & N. W. Ry. Co. vs. Stein (D. C. Neb.), *supra.*

Johnson, Brown & Co. vs. D. L. & W. Ry. Co. (D. C. Southern Dist. Georgia), *supra.*

D. L. & W. R. Co. vs. Henry Nuhs Co. (N. J.), *supra.*

Oregon, Washington R. R. & Navigation Co. vs. Cascade Contract Co. (Oregon), *supra.*

We believe that the above mentioned decisions are in accord with the Maxwell, Mottley and Gray cases, *supra.*

CONCLUSION.

It is respectfully submitted that the check in question was handled in a manner authorized by the petitioner on the check in that it was "Collectible at par through the Federal Reserve Bank at Minneapolis." That freight charges can be paid in money only and that a check is not money. That an obligation rests upon the petitioner which is equal to the obligation of the respondent to see that freight charges actually are paid in money. That permitting counter-claims to be interposed in suits brought to recover outstanding freight charges will interfere with the uniform collection of cash charges from all shippers and will open the door to discriminations under color of counter-claims and offsets.

It is respectfully submitted that the Circuit Court of Ap-

peals has correctly decided this case and petitioner's petition for a writ herein should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1929.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

(Italics appearing throughout this brief my own.)

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit and of the United States District Court for the District of Minnesota, Fourth Division, should be in all things affirmed because said judgments were duly rendered in accordance with certain statutes of the United States and in accordance with applicable decisions of this Honorable Court interpreting said statutes.

Official report of opinion in court below:

Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 36 Fed. (2) 180.

STATEMENT OF THE CASE.

In petitioner's "Statement of the Case," some of the facts which respondent feels are important have been omitted and, as will be pointed out later, certain assumptions or inferences are made in petitioner's "Statement of the Case," which are without any support therefore in the record.

This case is before this court on a petition for writ of certiorari directed to a judgment of the Circuit Court of Appeals for the Eighth Circuit (R. 84) rendered November 15, 1929, in favor of the respondent, upon which certiorari was granted by this Honorable Court on March 17, 1930 (R. 84).

The action was originally brought by the respondent's predecessors in interest to recover freight charges in the sum of $375.96, alleged to be due for transporting a carload of coal from Norfolk, West Virginia, to Kimball, South Dakota, consigned to the petitioner at said Kimball (R. 4). The car was loaded at Norfolk, West Virginia, June 9, 1926, and delivered to the petitioner at Kimball, South Dakota, on June 16, 1926 (R. 4).

In Paragraph IV of its answer the defendant denied that the shipment was duly transported and alleged that the plaintiff-respondent was negligent and caused loss and damage and further alleged that said loss and damage was paid by the plaintiff (R. 5), that is, the petitioner, when suit was commenced, conceded that any claim for loss or damage that they sustained on this shipment had been paid. The car of coal was unloaded and released by said petitioner at Kimball on June 19, 1926, at 5:00 P. M. (R. 17). The freight bill was presented to petitioner's agent between 2:00 and 3:00 P. M. on said June 19th (R. 17). In payment of said freight charges the respondent's agent received a check

from petitioner's agent (R. 17) drawn on the Lumbard State Bank of Kimball, payable to the Chicago, Milwaukee & St. Paul Railway Company, which contained on the face thereof the printed notation: "Collectible at par through the Federal Reserve Bank at Minneapolis" (R. 55-56).

On June 16, 1926, respondent's treasurer wrote to respondent's agent at Kimball that he had noticed by statement of June 8, 1926, that the cash reserve of the Lumbard State Bank was very low and collections in excess of $500.00 should not be exchanged at the Lumbard State Bank and further advised him that if he felt there was any question about the financial responsibility of the bank he was to send his collections direct to the depository at Chicago (R. 73). The agent at Kimball was further instructed:

> "Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals" (R. 73).

Respondent had no account in the Lumbard State Bank while the petitioner did have an account and, therefore, was in a better position than respondent to know the financial condition of the bank (R. 29 and 33). The petitioner got statements from the bank showing the cash balances in the bank and in a general way knew the condition of the bank (R. 40 and 41). The petitioner was a responsible company (R. 35). Dickie, the respondent's assistant treasurer, who actually issued the instructions to respondent's agent at Kimball, did not know that many of the shippers had accounts in the local banks (R. 35). The petitioner had its head offices at Minneapolis, Minnesota. Dickie testified that he did not have sufficient information to advise shippers that respondent felt that the Lumbard State Bank was in

financial difficulties (R. 35), but he knew conditions were bad in some twenty-five, thirty or fifty other places in South Dakota and western Iowa, where he had instructed agents to send checks direct to respondent's depository (R. 34).

The proof showed that petitioner had a bank balance in the Lumbard State Bank sufficient to pay the check in question but there is no proof that the bank had cash on hand on June 19th or any subsequent date sufficient to pay the check of $375.96.

Respondent's agent, after receiving the check on June 19th, put it in his cash drawer at the depot (R. 18) and forwarded it by the first train (R. 41) which was on the next morning, Sunday, June 20th (R. 19) with certain other checks and currency, direct to his depository, the Central Trust Company of Illinois at Chicago (R. 19). Upon receipt of the check the Central Trust Company on June 22 endorsed the check for respondent (R. 30 and 31). The check then went to the Federal Reserve Bank at Minneapolis (R. 31) and was endorsed by that bank on June 23 (see Exhibit C, R. 55-56).

The record does not show if the Federal Reserve Bank held the check in its bank or whether it forwarded it to the Lumbard State Bank. As it was collectible at par through the Federal Reserve Bank at Minneapolis, it may have been retained in that bank. The Lumbard State Bank closed its doors at noon on June 25, 1926 (R. 26).

The petitioner introduced in evidence a large number of checks (R. 57 to 72) which were paid at the Lumbard State Bank during the years 1925 and 1926. Only two of these checks were cashed after June 19th; one a check of merely $50.00 was cashed on June 23rd (R. 41) and one, a check of $20.55 was cashed on June 24th (R. 41). On June 23rd the petitioner deposited $286.88 in the bank (R. 42) and on

June 24th got a bank draft from the Lumbard State Bank for $300.00 (R. 41). The bank draft, apparently, was never paid (R. 42).

The check, of course, when it was refused, was returned to the Treasury Department of the railroad. Some little time after the transactions described herein a claim was made by the petitioner to the Overcharge Department of the respondent and that department, upon the receipted freight bill and upon a showing that the weight was incorrect, paid the petitioner $4.26 (R. 36). The receipted freight bill would indicate to the Overcharge Department that the $375.96 had actually been paid. This overcharge indicates that the proper charges on the shipment were $371.70. The respondent received check which never was paid. The respondent, therefore, was out the sum of $371.70, tariff charges, and also the $4.26 which had been erroneously paid by the respondent's Overcharge Department under the impression that the petitioner had actually not only paid the full tariff charges but an excess of $4.26. Therefore, the respondent, if the check did not constitute a payment, was outstanding the sum of $375.96, the amount sued for and the amount entered in the judgments here involved.

The trial court, in his original findings, stated that both parties knew that the Lumbard State Bank at Kimball was not in the best of financial circumstances at the time of the execution of the check (R. 13).

STATEMENTS MADE BY PETITIONER UNSUPPORTED BY RECORD.

A few statements made in petitioner's "Statement of the Case" seems to be without any support in the record.

On page 4, commencing on the last line of petitioner's brief, the statement is made:

> "The check was not presented for payment at the Lumbard State Bank at Kimball, the bank on which it was drawn, until June 28, 1926, nine days after it had been delivered to the railroad company's agent" (R. 38-55).

There is absolutely no support for this statement in the record and so far as the record shows and so far as the writer of this brief knows, the check never was actually forwarded by the Federal Reserve Bank to the Lumbard State Bank.

It will be noted that the check was endorsed by the Federal Reserve Bank at Minneapolis on June 23rd, as shown by Plaintiff's Exhibit C, the check itself (R. 55-56).

On page 5 of petitioner's brief, commencing on the 10th line, petitioner states:

> "But when the check, Exhibit C, was put in evidence by respondent, it had attached to it the bank slip showing presentment and refusal on the 28th, as we recall it; and, at all events, it was after the bank closed on Friday noon of June 25."

This is not based upon any testimony in the case and is not correct. The slip of paper which was taken from the check at the time it was introduced in evidence and which is in the writer's file, reads as follows:

> "Returned by
> Central Trust Company of Illinois
> To.....
> For Bank reported closed."

The original slip, just quoted, has been attached to the end of respondent's original brief.

Plaintiff's Exhibit C, the check in question, contained the printed notation:

> "Collectible at par through the Federal Reserve Bank at Minneapolis."

Apparently the last endorsement made upon the check was the following:

> "Payable to the order of any Bank, Banker or Trust Company. All prior endorsements guaranteed. June 23, 1926. Federal Reserve Bank, Minneapolis, Minn."

There is no proof that the Federal Reserve Bank at Minneapolis actually forwarded this check to the Lumbard State Bank and there is no proof that it was necessary for it to do so. The question as to whether or not it was forwarded to the Lumbard State Bank is wholly without proof in the record. If we are to assume that it was forwarded and if the Federal Reserve Bank forwarded it at the close of business on June 23rd, the date on which it endorsed the check, the check should have been received at the Lumbard State Bank on the afternoon of June 24th, or in other words, the day before the bank closed. There is no proof that the check was not to be paid at Minneapolis and no proof that the check was sent to the Lumbard State Bank and if it was sent to the Lumbard State Bank there is no proof as to whether it arrived there on June 24th or June 25th before the bank closed or whether it arrived after the bank closed.

In this connection we again call the court's attention to the fact that on June 24th the petitioner obtained a bank draft from the Lumbard State Bank in the sum of $300.00 (R. 41) and that this draft apparently was not paid (R. 42) and we further call attention to the fact that the only two checks which were cashed after June 19th only totaled $70.55 and to the fact that the petitioner, on June 23rd,

alone had deposited four times that amount in the bank (R. 42). There is no proof that if presented for payment between June 19th and June 25th, the bank could or would pay the check.

The statement is made in petitioner's brief, on page 5, commencing with the 16th line:

> "If Mr. Gustafson, the Milwaukee agent, had immediately obtained from the bank the currency called for by the check, or if the bank had not closed its doors, the check would have been paid when it arrived and the controversy involved in this litigation would not have arisen."

As stated, there is absolutely no proof to show that the bank was at any time able to pay the check for $375.96 from the day it was received by the respondent until the bank closed.

On page 5 of petitioner's brief the statement is further made:

> "It is not denied that an individual is under the duty of presenting the check for payment on the same or next succeeding business day, but the railroad contends that a ruling of the Interstate Commerce Commission protects it from the effect of the rules of law which ordinarily govern such a situation."

The respondent does not concede that an individual would be required to cash the check at Kimball if his own account were in a bank in Chicago and if the check bore the notation that the check was collectible at par through the Federal Reserve Bank at Minneapolis. We do not concede that with knowledge no greater than that of petitioner that we are negligent in sending the check to our depository at Chicago when the petitioner on the day preceding the closing of the

bank obtained a bank draft from the Lumbard State Bank instead of obtaining cash. Certainly there is no proof that if the petitioner knew its check was to be sent to Chicago that it would have objected thereto.

The writer of this brief is not personally familiar with most of the matters referred to in Mr. Root's letter of August 18, 1930, or in the majority of the statements made in the appendix to petitioner's brief. His only connection with the matter was to prepare and sign a satisfaction of the judgment which he then assumed would be filed and dispose of the case. The appendix and Mr. Root's letter both show the settlement was a conditional one only contingent upon the final determination of the matter on this appeal.

Inasmuch as both parties desire a decision of this matter on its merits and are willing to have the rights and liabilities of the parties governed by the decision of this court any answer to the appendix would seem to be unnecessary.

ARGUMENT.

THE INTERSTATE COMMERCE ACT AND THE ELKINS AND HEPBURN AMENDMENTS TO SAID ACT, AS WELL AS THE TRANSPORTATION ACT OF 1920, PREVENTED THE INTERVENTION OF PETITIONER'S COUNTERCLAIM IN THE INSTANT CASE.

Sec. 2 of the Interstate Commerce Act of Feb. 4, 1887, Chapter 104, Sec. 2, 24 Stat. 379; as amended February 28, 1920, Chap. 91, Sec. 404, 41 Stat. 479, Sec. 2, Title 49, of U. S. C., Subds. 1 and 2 of Sec. 3 of the Interstate Commerce Act of Feb. 4, 1887, Chap. 104, Sec. 3, 24 Stat. 380; as amended Feb. 28, 1920, Chap. 91, Sec. 405, 41 Stat. 479, Subds. 1 and 2 of Sec. 3, Title 49, of U. S. C., Sec. 1 of the Elkins Amendment to the Interstate Commerce Act, Chap. 708, Sec. 1, Feb. 19, 1903, 32 Stat. 847; as amended June 29,

1906, Chap. 3591, Sec. 2, 34 Stat. 587, Sec. 41, Title 49, of U. S. C.; The Hepburn Amendment to the Interstate Commerce Act of Feb. 4, 1887, Chap. 104, Sec. 6, 24 Stat. 380, as amended March 2, 1889, Chap. 382, Sec. 1, 25 Stat. 855; as amended June 29, 1930, Chap. 3591, Sec. 2, 34 Stat. 586; as amended June 18, 1910, Chap. 309, Sec. 9, 36 Stat. 548; as amended Aug. 24, 1912, Chap. 390, Sec. 11, 37 Stat. 568; as amended Aug. 29, 1916, Chap. 417, 39 Stat. 604; as amended Feb. 28, 1920, Chap. 91, Secs. 409 to 413, 41 Stat. 483; Subd. 7, Sec. 6, Title 49, of U. S. C., prevent counterclaims from being interposed in actions for freight tariff charges on shipments moving in interstate commerce, except in so far as such right to counterclaim is allowed under the decision of this Court in the case of *Chicago & Northwestern Ry. Co. v. Lindell, infra.* For the convenience of the court the material portions of the aforesaid Acts are set out in the Appendix to this brief.

The Elkins Act, so far as here material, makes it unlawful for any person, persons or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce or whereby any other advantage is given or discrimination is practiced.

A summary of the decisions shows a failure to collect royalty on mining lands leased to a shipper, or to lease property to a shipper at less than its full market rental, the making of a donation to aid an industry in building on a particular railroad or the giving of more extensive credit to certain shippers than others in a like situation constitute violations of the Elkins Act.

N. C. Ry. Co. vs. U. S., 241 Fed. 25.

Vandalia Ry. vs. U. S., 226 Fed. 713. Writ of Certiorari denied 239 U. S. 642, 36 Sup. Ct. 163.

Cent. of Georgia vs. Blount, 238 Fed. 292.

Fireproof Storage Co. vs. Hines, 261 Fed. 215.

Southern Pacific Terminal Co. vs. I. C. C. and Young, 219 U. S. 498, 31 S. C. 279.

U. S. vs. Union Stockyards & Transit Co. of Chicago, 226 U. S. 286, 33 Sup. Ct. 83.

U. S. vs. Lehigh Valley Ry. Co., et al., 254 U. S. 255, 41 Sup. Ct. 104.

A violation occurs even though no actual discrimination between shippers is shown.

Pa. Co. vs. U. S., 257 Fed. 261, 264.

Hocking Valley Ry. Co. vs. U. S., 210 Fed. 735.

U. S. vs. Metropolitan Lbr. Co., 254 Fed. 335.

C. & A. Ry. Co. vs. U. S., 156 Fed. 558.

The mere offer or solicitation of the rebate is sufficient.

U. S. vs. Lehigh Valley Ry. Co., 254 Fed. 332.

The purposely doing a thing prevented by the Act constitutes an offense under the Act even though the party in question did not intend to violate the Act.

U. S. vs. Erie Railway, 222 Fed. 444.

Armour Packing Co. vs. U. S., 209 U. S. 56, 28 Sup. Ct. 428.

C. St. P. M. & O. Ry. Co. vs. U. S., 162 Fed. 835.

The giving of preference by means of consent judgments or waivers of defenses available to the carrier constitute offenses under the Interstate Commerce Act.

Phillips Co. vs. Grand Trunk Ry., 236 U. S. 662, 35 Sup. Ct. 444.

Railroad carriers and shippers cannot compromise claims for freight, passenger or other tariff charges and cannot prevent the collection of the full tariff charges by virtue of

lawful contracts as to charges to be collected which were duly entered into prior to the passage of the State and Federal Acts relating to such charges.

Armour Packing Co. vs. U. S., supra.

C. & O. Ry. vs. Standard Lumber Co., 174 Fed. 107.

M. St. P. & S. S. M. Ry. Co. vs. Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411. Writ of certiorari denied.

Menasha Wooden Ware Co. vs. M. St. P. & S. S. M. Ry. Co., 245 U. S. 663, 38 Sup. Ct. 133.

C. B. & Q. Ry. Co. vs. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513.

Milwaukee Electric Co. vs. Wisconsin Railroad Com., 238 U. S. 174, 35 Sup. Ct. 820.

Raymond Lbr. Co. vs. Raymond Light and Water Co., et al., 92 Wash. 330, 159 Pac. 133.

Tariff charges must be collected at destination before the possession of any freight transported is relinquished except as provided by rules and regulations of the Interstate Commerce Commission. The Commission has permitted extensions of credit in some cases not exceeding 96 hours. In re: Sec. 3 of the Interstate Commerce Act as amended by Sec. 405 of the Transportation Act of 1920 in *Ex Parte* No. 73, 57 I. C. C. 591, 596, 596-a and 596-b.

The assertion by a shipper of the right to counterclaim particularly in unliquidated claims in actions which have been brought to recover railroad tariff charges in the state courts at congested centers, such as Hennepin County, Minnesota, and Cook County, Illinois, will of necessity delay the payment of freight charges for periods from eight months to three years, until the unliquidated counterclaim is reduced to a judgment after trial. The shipper, in asserting

a counterclaim in such cases unduly postpones the collection of the carrier's charges and thereby nullifies, to a considerable extent, the effect of the above mentioned statutes and regulations of the Commission.

A brief discussion of the decisions relating to the question as to whether a claim for damages can be set up as a counterclaim may be helpful.

A Review of Conflicting Authorities as to Whether or Not a Claim for Damages Can Be Set Up as a Counterclaim in an Action Brought to Recover Interstate Tariff Charges of a Railroad.

Decisions in which counterclaims were held to be proper.

In *Wells-Fargo Co. vs. Cuneo*, 241 Fed. 727, the District Court for the Southern District of New York held in an action to recover a tariff charge that set-offs and counterclaims were pleadable and apparently relied upon the policy of the law to settle germane controversies in one action instead of two.

It is worthy of note that the court erroneously assumed that the mere fact of delivery of goods for shipment imparts, under the Interstate Commerce Act, as a matter of law, an absolute promise to pay freight charges and that an agreement to the contrary is void. This is pointed out in the note appended to the case.

L. & N. Ry. Co. vs. Cent. Iron Co., 265 U. S. 59, 69, 44 Sup. Ct. 441, 443.

Therefore, the Cuneo case, in part, has been disapproved by this Court.

Cases holding substantially the same as the Cuneo case are:

C. & N. W. Ry. Co. vs. E. C. Tecktonius Mfg. Co. (E. D. of Wis.), 262 Fed. 715.

N. Y. C. vs. Fed. Fuel Refining Co., 201 App. Div. 466, 194 N. Y. Sup. 467, which was reversed on ground here not material in 235 N. Y. 182.

N. C. & St. L. Ry. vs. Tennere Mill Co., 143 Tenn. 237.

Cent. of Georgia vs. Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 Southern 202.

Pennsylvania Railroad vs. Bellingham, 101 N. Y. Misc. Rep. 105, 166 N. Y. Sup. 652.

In the case of *C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp.*, 26 Fed. (2) 90, the Court considered the matter as a doubtful one and later the court, in an effort to have the matter passed upon by the Circuit Court of Appeals, reversed its order in 26 Fed. (2) 90 and granted the motion to strike the counterclaim. An appeal was dismissed by the Circuit Court of Appeals without deciding the question. Defendant again moved to reinstate the counterclaim and the motion has not been decided: The honorable trial court, we understand, expects the decision in the instant case will point the way to a correct solution.

The Pioneer Grain Corporation case has been in the Federal Court for years and is a striking example of the effect of delay upon payment of tariff charges by reason of the interposition of counterclaims. The Pioneer Grain Corporation case involved the matter of payment of certain demurrage charges covering two periods of time. Charges in the amount of about $2,300.00 were at one time conceded to be due by the Pioneer Grain Corporation; other demurrage charges, however, which were something in excess of one thousand dollars were in dispute. The Railroad Company, believing that all of the charges were due, and believing that

they could not compromise the disputed charges, brought suit to recover all of the charges and a counterclaim then for the first time, was interposed for alleged discrimination in the distribution of cars, which the investigation of and defense to by the carrier would be very expensive as it involved the handling of cars over a long period of time and also involved the checking and compiling of records not only of the plaintiff carrier but of many other railroads at Minneapolis. Since the action was commenced the Pioneer Grain Corporation has discontinued doing business and the probabilities of collecting charges by the carrier, if a judgment is obtained, is doubtful.

The absolute obligation of collecting its full tariff charges is placed upon the carrier. In many instances the carrier, if it lawfully could do so, would prefer to accept the amount which the shipper offers to pay rather than litigate the matter. If counterclaims can be properly interposed in actions brought to recover tariff charges and such actions can be compromised by the parties, the tendency will be to compromise the counterclaim for the amount of the tariff charges.

In Minnesota most actions which are compromised before a trial are disposed of by merely filing stipulation of dismissal with the clerk of the court and no order or judgment of dismissal is obtained.

In *Payne vs. Clark* (S. D. of Cal.), 271 Fed. 525, the Court apparently was influenced by the provisions of Sec. 439 of the Code of Civil Procedure of California, which provides:

> "If the defendant omits to set up a counterclaim upon a cause of action arising out of the transportation set forth in the complaint as a foundation of plaintiff's claim, neither he nor his assignees can afterwards maintain an action against the plaintiff therefor."

Also by Sec. 440 of the California Code, which provides:

> "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or debt of the other."

The statutes just quoted also were applicable in the case of *C. & N. W. Ry. Co. vs. O. N. Lindell, infra.* The Lindell case is of such importance inasmuch as it is the only expression of this Honorable Court, that we will discuss it separately and point out features distinguishing it from the instant case.

Cases holding that counterclaim cannot be interposed.

There are many well-reasoned decisions holding that counterclaims should not be permitted in actions brought to recover transportation charges and we call the Honorable Court's attention to the following cases so holding:

Ill. Cent. Ry. Co. vs. Hoopes & Son (D. C. of Southern Dist., Iowa), 233 Fed. 135.

C. & N. W. Ry. Co. vs. Stein & Co. (D. C. of Neb.), 233 Fed. 760.

Johnson, Brown & Co. vs. D. L. & W. R. Co. (D. C., Southern Dist., Ga.), 239 Fed. 590.

Pa. Ry. Co. vs. South Carolina Prod. Assn. (D. C. E. D. of S. C.), 25 Fed. (2) 315.

Mich. Cent. Ry. Co. vs. Carl and W. J. Piowaty (D. C., N. D., Ill., E. D.), 36 Fed. (2) 604.

We understand, in the case just cited, in March or April,

1930, the trial judge reversed his ruling and reinstated the counterclaim, being of the view that the Lindell case, *infra*, required such change. This latter decision, so far as we know, has not been reported.

Oregon, Washington R. R. & Navigation Co. vs. Cascade Construction Co., 101 Oregon 582, 197 Pac. 1085.

D. L. & W. Ry. Co. vs. Henry Nuhs Co., 93 N. J. Law 309, 111 Atl. 223.

Adams Express Co. vs. Albright Bros., 75 Pa. Sup. Ct. 410.

Busch vs. Keystone Driller Co., 199 Mo. App. 152, 199 S. W. 597.

Yazoo, etc., Ry. Co. vs. Searles, 85 Miss. 520, 37 Southern 939.

The decision of the Circuit Court of Appeals in the instant case sets out very ably the reasons why the above courts refuse to permit the counterclaims to be interposed in claims brought to recover railroad tariff charges.

We take the liberty of quoting rather extensively from this opinion. On page 187 the Honorable Circuit Court of Appeals states as follows:

> "(2) On the question whether a counterclaim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges, there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the freight charges, and we think this conforms to the intent of Congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction

of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burdensome to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers, the whole intent and purpose of Congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers, the suits would inevitably open the door to gross discriminations under color of counter-claims and offsets which the courts could not prevent. In fact, a measure of discrimination is present as soon as a counter-claim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counter-claims or offsets and then they cannot be adjudged to pay their freight charges until all such matters of counter-claim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash, but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of Congress to abolish them all is clear. The federal courts are also bound to the same purpose, and, as the practice of permitting counterclaims in these suits tends to defeat the purpose, the practice should not be permitted

even though there is a statute of the state sanctioning counterclaims generally in law actions."

It will be noted in the above quotation that the court states that such counterclaims should not be permitted even though the state statute sanctions such counterclaims. The situation, however, might be quite different if the statutes of Minnesota were like the California statute, which requires that counterclaims be interposed in an action brought to recover charges on the same shipment.

Some additional reasons for sustaining the above case will be set out in our discussion of the Lindell case, *infra*.

THE HEPBURN ACT REQUIRES CARRIERS TO COLLECT AND SHIPPERS TO PAY THE FULL TARIFF RATES AND CHARGES IN MONEY ONLY.

The petitioner wishes to give the impression that the respondent carrier owed the sole duty to see that the check was cashed and that money was received to pay the outstanding freight charges. This is not an exclusive duty or obligation on the part of the carrier but it is a duty which is also owed by the shipper or consignee of the freight. If the Lumbard State Bank actually was solvent on June 19th, the petitioner could have gone to the Lumbard State Bank and obtained cash and turned it over to the agent of respondent at Kimball in payment of the charges. The record shows that the petitioner's office at Kimball was only two and one-half blocks from the Lumbard State Bank (R. 24).

In *L. & N. Ry. Co. vs. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 495, this Honorable Court brings out the fact that shippers as well as carriers must see that the proper charge is paid. On page 495 this court said:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

The record shows, as previously outlined, that the shipment involved a movement from Norfolk, West Virginia, to Kimball, South Dakota (R. 18). The petitioner, of course, knew that the respondent's line of railroad did not extend to Norfolk, West Virginia, and therefore knew that it, for at least a considerable portion of the aforesaid charges, was merely acting as agent for other railroad carriers and as the respondent for a considerable portion of the charges was the agent only it would seem that the petitioner by reason thereof was presumed to know that the respondent was authorized to receive money only in payment of the charges of its principal.

This Honorable Court has held that a collecting agent is without authority to accept for the debt of his principal anything but what the law decrees to be legal tender or which is by common consent considered and treated as money and passes as such at par.

See *Ward vs. Smith*, 7 Wallace, 447, 452, 19 Law Ed. 207

Federal Reserve Bank of Richmond vs. Malloy, 264 U. S.

160, 68 L. Ed. 617, 44 Sup. Ct. Rep. 296, affirming *Federal Reserve Bank of Richmond vs. Malloy, et al.* (4th Circuit), 291 Fed. 763, and *Malloy v. Federal Reserve Bank of Richmond*, 291 Fed. 997.

The obligation of petitioner to pay the freight charges had not been performed until the freight charges were actually paid in money.

It is respondent's position that the giving of this check did not constitute a payment of the freight charges for the reason that freight charges must be paid in cash or other legal tender and that until such check was actually cashed and the money deposited to the account of the respondent or the cash received by the respondent, the obligation on the part of the petitioner to pay the charges had not been discharged.

Certain decisions we think are conclusive on this matter and we first call the court's attention to a rule of the Interstate Commerce Commission adopted by that Commission on September 15, 1906, known as Conference Ruling 207, reading as follows:

> "207. PAYMENT FOR TRANSPORTATION.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

This ruling has been referred to and approved by this court in the case of *L. & N. Ry. Co. vs. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 268. In that case, on page 268, this court said:

> "In our opinion, after the passage of the commerce act, the railroad company could not lawfully accept from Mottley and wife any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule *were payable only in money.*"

On the same page, the court further says:

> "*That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings* (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time precludes the acceptance of service, property, or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute."

On the same page the court further says:

> "The statute manifestly means that the *purchase of* a transportation *ticket by a passenger*, and its sale by

the company, shall be consummated only by the former *paying cash* and by the latter *receiving cash* of the amount specified in the published tariffs."

The United States Supreme Court again went into this matter very carefully in the case of *C. I. & L. Ry. Co. vs. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 274. On page 274 this court said:

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for *in money*, which has a certain value, known to all, and not in commodities or services, or otherwise than in money."

In *Lake & Export Coal Corp. vs. C. & O. Ry. Co.* (4th Circuit) 1 Fed. (2d) 968, in referring to the Gray case, *infra*, the court said:

"It was held that he was entitled to demand that sum in money from the railroad, it was not permitted to furnish it to him in transportation. In short, he would have to buy tickets, and it would have to *pay* him what it owed him *in cash*, and not in passes."

See also *N. Y. C. & H. R. R. Co. vs. Gray*, 239 U. S. 583, 36 Sup. Ct. 176.

Pennsylvania Railroad Co. vs. South Carolina Producers Assn., 25 Fed. (2) 315, 317.

In *C. & N. W. Ry. Co. vs. William S. Stein Co.*, 233 Fed. 716, the court said:

"Under the Acts of Congress relating to the transpor-

tation of interstate commerce, as construed by the Supreme Court of the United States in *Louisville & Nashville Railroad Company vs. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, and in *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 286, 31 Sup. Ct. 272, 55 L. Ed. 305, the carriers cannot accept in payment for the transportation of interstate commerce *anything but cash*, and no contract, however fair, looking to the payment for such services by an exchange of commodities can stand."

See also *L. & N. R. Co. vs. Maxwell, supra.*

A. J. Phillips Co. vs. G. T. & W. Ry. Co. et al., supra.

It is the respondent's position that the giving of the check did not discharge the liability of the petitioner for the freight charges until the respondent railway company had received money to cover the charges.

In *Eggleston vs. Plowman, County Treasurer*, 49 S. D. 609, 207 N. W. 981, a taxpayer gave a draft to the county treasurer in payment of taxes and said treasurer neglected to present the draft to the bank for three weeks. In the meantime the bank failed. The Supreme Court of South Dakota held mandamus would not lie to compel the issuance of a tax receipt for the reason the taxes were not paid until cash had been received by the county treasurer. On pages 981 and 982 the court said:

"This proceeding is by the property owner himself against the defendant in his official capacity as a county officer seeking to compel the performance of an official duty, namely, the issuance of a tax receipt, which receipt the officer has no right to issue until the taxes are

paid. Section 6765, Rev. Code 1919.

"A county treasurer has no authority to accept anything other than money in payment of taxes, excepting in such instances, not here material, as the statute expressly otherwise provides, and in the instant case the treasurer had no right to accept the draft as payment of the tax, and did not in fact undertake or agree so to accept the draft.

"*It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid.* These propositions are conceded by appellant, but he undertakes to apply to the defendant as a public official the same rule that would obtain between private individuals, and to maintain that the draft, although conditional payment only when offered, yet, having been retained by the defendant instead of being refused and returned, defendant's want of diligence in presenting it for payment operates to extinguish plaintiff's obligation.

"*We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual, whose duty it is under the law to pay his taxes and pay them in money, and a public officer, whose duty it is to collect the taxes and collect them in money.*"

The language just quoted applies with equal force to the instant case, to-wit: It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid. * * * We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual,

whose duty is under the law to pay freight charges and pay them in money, and a *quasi*-public corporation, whose duty it is to collect freight charges and collect them in money.

We have the same situation in the instant case that existed in the Eggleston case. In our case freight charges can be paid in cash only and if any other device is used to pay the charges the debt is not discharged until cash is actually received by the railway company for the charges.

The statement on the check "Collectible at Par through Federal Reserve Bank at Minneapolis" justified the respondent in sending said check to its depository at Chicago to be sent to the Federal Reserve Bank at Minneapolis for collection.

The Central Trust Company of Illinois at Chicago was the depository for the respondent. The Lumbard State Bank was not a depository for the respondent.

No proof was introduced by the petitioner that the sending of the check to respondent's depository at Chicago from which it was forwarded to the Federal Reserve Bank at Minneapolis was negligent or improper.

We believe the case of *Spokane Valley State Bank vs. Lutes, et al.*, 133 Wash. 66, 233 Pac. 308, indicates that this check was handled in at least one of the customary manners of handling checks of this character and we call the court's attention to the following quotation in said opinion, appearing on page 310:

> "There appears to be some contention that it was negligence for the Exchange National Bank to send the draft for collection through the Federal Reserve Bank rather than sending it direct to Billings. The evidence shows that this was in accordance with the custom of banks. If the custom was a general one, as the evidence shows, and was reasonable, the appellants were bound

by it, even though it was not actually known to them at the time they placed the certificate of deposit with the respondent for collection, according to the weight of authority, though there are cases holding the other way. The prevailing rule appears to be that the general usage and customs of banks in making collections will bind persons dealing with them in this business, whether such usage or custom be known or not; this upon the theory that, when a person hands over a negotiable instrument to a bank for collection without remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course. Either he knows and approves of the ordinary and customary way that collections are handled by banks, or he voluntarily trusts to the wisdom of the bank in handling the matter. He impliedly consents to its collection in the usual and ordinary way."

A check is not money. In South Dakota a payment by check is a conditional one only.

In the *American and English Encyclopedia of Law*, Second Edition, Volume 20, page 837, money is defined as follows:

"Money is defined as that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, *being accepted equally without reference to the character or credit of the person who offers it* and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities."

In this connection we call the court's particular attention

to Defendant's Exhibit 4 which is a letter from the treasurer of the plaintiff to the agent at Kimball in which he states:

> "Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals" (R. 73).

It is clear, therefore, that this check was accepted because of the good credit of the Fullerton Lumber Company and this and other checks, of course, are dependent upon the character or credit of the payor and, therefore, are not money.

The following note appears in the *American and English Encyclopedia of Law*, Section Edition, Vol. 20, page 838:

> "In *Wills vs. Allison*, 4 Heisk. (Tenn.) 392, it was said: 'Money,' said Sir William Blackstone, 'is the universal medium or common standard, by comparison with which the value of all merchandise may be ascertained; or, it is a sign which represents the value of all commodities.' 1 *Black Com.* 276; *Sto. on Con.*, Sec. 1118. And so it is defined by Lord Ellenborough in 13 *East* 20; and by Chancellor Kent in *Mann vs. Mann*, 1 Johns. Ch. (N. Y.) 236, to be cash, that is, gold and silver, or the lawful circulating medium of the country—including banknotes, when they are known and approved of, and used in the market as cash.' Standard of Value.—'Money is not only a medium of exchange, but it is a standard of value.' Per *Field*, J., dissenting, in *Legal Tender Case*, 110 U. S. 462, 4 Sup. Ct. R. 137, 138."

A check clearly does not come within the definition of money referred to above. It is neither a universal medium nor common standard by which the value of merchandise

may be ascertained, it is not a standard of value and its value does depend upon the character and credit of the person who offers it.

In *Townsend vs. Swallow, et al.*, 91 Nebr. 564, 136 N. W. 730, in a syllabus by the court, it is said:

> "A decree for the payment of money means lawful money of the United States; the creditor is not required to receive private checks as a compliance with the decree."

Freight charges on goods moving in interstate commerce can be paid in money or cash only.

The Interstate Commerce Commission in *California Sugar & White Pine Company vs. Director General, as Agent*, 73 I. C. C. Reports, 338, at page 339, said:

> "The Interstate Commerce Act prohibits a carrier from charging, demanding, collecting or receiving a greater or less or different compensation than that specified in its tariffs, and *nothing but money* can be lawfully accepted in payment for transportation subject to the act."

See also decision of said Commission in "*Payment of Charges in United States Currency*," 59 I. C. C. 263.

The payment of these charges took place in the state of South Dakota. The Supreme Court of that state clearly held that payment by a check is not a payment in money and is a conditional payment only and such payment becomes absolute only when the check is in fact paid.

See *Eggleston vs. Plowman, County Treasurer, supra.*

The Transportation Act of 1920 and the Order of the Commission in Ex Parte No. 73 require carriers to promptly collect all tariff rates and charges in at least 96 hours.

Subdivision 2 of Section 3 of the Interstate Commerce Act as amended by Section 405 of the Transportation Act of 1920, 24 *Statutes at Large* 379, 41 *Statutes at Large* 479, provides as follows:

> "(2) From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided*, that the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof or for any state or territory or political subdivision thereof, or for the District of Columbia."

It will be noted that the provision authorizes and directs the Interstate Commerce Commission to fix rules and regulations concerning the payment of freight and demurrage charges. Pursuant to this direction and authorization the Interstate Commerce Commission in *Ex Parte No. 73*, 57 I. C. C. 591, at page 596, stated as follows:

> "The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery

of most shipments, and, while adhering to the principle of prompt payment of charges, should, upon certain freight traffic, give opportunity for the preparation of freight bills at destination, weights to be ascertained after the carriers have relinquished possession of freight, and for the presentation of freight bills to the appropirate offices and employees of shippers by United States mail, by messenger, or by other proper means, and for payment of the charges in the regular course of business by the shippers. An order will be issued in accordance with these conclusions."

The order in said proceeding, which fixes a maximum limit of ninety-six hours in which freight and demurrage charges may be paid, with a few exceptions not material herein, is found in 57 I. C. C. at pages 596-a and 596-b. The order itself is also quoted, for convenience, in the appendix. This order has been modified in three subsequent decisions to permit special relief on certain specified traffic not here material. The decisions are *Ex Parte No. 73*, I. C. C. 456, 63 I. C. C. 375 and 69 I. C. C. 351.

No exception is made by the Interstate Commerce Commission which permits shippers or consignees receiving freight to withhold payment of freight or demurrage charges because of a set-off or counterclaim against the carrier.

Permitting shippers and consignees of freight to delay payment of freight or other tariff charges pending the disposition of claims made by them upon transactions taking place after the transportation is complete or upon other shipments, nullifies the effect of said Sec. 3 and *Ex Parte No. 73.*

The Lindell case does not permit a counter-claim to be interposed in an action to recover tariff charges unless said counterclaim is based upon the identical shipment and then only in case the applicable State statute requires the counter-claim to be so interposed.

In *C. & N. Ry. Co. vs. O. N. Lindell,* 281 U. S. 14, 50 Sup. Ct. 200, the Circuit Court of Appeals for the Ninth Circuit certified the following quoted question to this Honorable Court requesting instructions thereon, which appears on page 200 of the decision:

> "Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district *where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and,* further, that where such cross-claims have existed 'the two demands shall be deemed compensated,' is the *shipper acting in good faith and without collusion, debarred* by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of set-off, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the *identical shipment?*" (Italics my own.)

This Honorable Court held that the counter-claim could be interposed. The decision contains some rather broad language. In view of the importance of the question involved

we trust it is proper for us to set out reasons why the decision in its future application should be restricted to the facts in that case. We call attention to the following appearing on page 201:

> "The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges is not repugnant to the rule prohibiting the payment of such charges otherwise than in money. The *adjudication in one suit* of the respective claims of plaintiff and defendant is the practical *equivalent of charging a judgment obtained in one action against that secured in another.* Neither is to be distinguished from payment in money." (Italics my own.)

The above quotation takes care of a situation where the counterclaim is interposed in an action brought for transportation charges and after a trial a judgment is entered in the main action and in the counterclaim. The opinion is expressed that the off-setting of one judgment as against the other cannot be distinguished from a payment in money. The majority of lawsuits, however, are disposed of before a final adjudication by the court. In claims for loss and damage and discrimination, in most cases the damages are liquidated. If the parties are to agree upon the amount to be paid upon the counterclaim and then offset it as against the freight charges it cannot be said that the transportation charges have been paid in money. If the mere agreement of parties as to the value of a claim or an article is sufficient, we are unable to distinguish the decisions of this Honorable Court in the case of *L. & N. Ry. Co. vs. Mottley, supra,* in which transportation was furnished as part payment on a personal injury claim; *C. I & L. Ry. Co. vs. United States, supra,* in which advertising in the Munsey Magazine was

accepted as payment of transportation charges, and *N. Y. C. & H. R. R. Co. vs. Gray, supra,* in which a map was accepted in payment of transportation charges.

It seems clear to us that in the Lindell case, particularly in the quotation above, this Honorable Court had in mind a situation in which the amount of freight charges was agreed upon and the amount of the counterclaim was agreed to be at least equivalent to the freight charges and judgment had been entered on both.

We also call attention to the following language of the United States Supreme Court in the said Lindell case, appearing on page 201:

> "(3) The act ought not to be construed to put aside state laws and long established practice in respect of pleadings unless the intention of Congress so to do is plain."

We again suggest that this Honorable Court, in the language just quoted, manifestly had in mind the obligatory California statute which provided the defendant must set up a counterclaim arising out of the transaction constituting foundation of plaintiff's claim. Ordinarily the question as to whether a counterclaim may or may not be interposed is a matter of procedure depending upon the statutes of the forum. Minnesota does not have a statute requiring the setting up of the counterclaim. Its statute, which is permissive only, is included in the appendix to this brief.

In the Lindell case this court further said:

> "The appellant is liable to the appellee for damages in an amount at least equal to the charges sued for."

Apparently this court, in deciding the Lindell case, relied considerably upon the argument of convenience. Possibly it overlooked the fact that the Carmack Amendment to the

Interstate Commerce Act, as amended, 34 Stat. 534, 38 Stat. 1197, 41 Stat. 494, 44 Stat. 835, and the Newton Amendment to the Carmack Amendment of Mar. 4, 1927, Chap. 510, Sec. 3, 44 Stat. 1448, respectively permit a shipper or lawful holder of the bill of lading to sue the initial or originating carrier for the negligence of all the carriers and also permits the shipper and lawful holder of the bill of lading to sue the delivering or destination carrier for the negligence of all carriers. Under the present law, therefore, both the shipper and consignee can conveniently sue one carrier for the negligence of all. If the consignee has a claim for damage or loss he can conveniently sue the destination carrier under the Newton Act. On the other hand, the shipper can conveniently sue the originating carrier under the Carmack Amendment.

Lindell could conveniently have sued the originating carrier in California for the negligence of all carriers, including any negligence of the Chicago & Northwestern Railway Company.

In the Lindell case the California statute, Sections 439 and 440 of the *Code of Civil Procedure, supra,* compelled the decision reached in that case. In that case the counterclaim was for loss and damage on the identical shipment in the sum of $1,011.70. A claim for loss and damage is not created by the Federal Act, the counterclaim action being for less than $3,000.00, even though a proper diversity of citizenship existed between the shipper and the carrier the action could not be brought in the Federal Court. See *Judicial Code,* Section 24; Sec. 41, Title 28 U. S. C.

The cause of action which was set up as a counterclaim, if sued in an independent action by the shipper residing in California, would of necessity be sued in the state court of California.

Under the California statute the state court would be compelled to dismiss the action. The shipper's only remedy was the counterclaim in the action for freight charges or else to sue the destination or initial carrier in some state other than California.

There is, of course, some serious question as to whether or not the public policy expressed in the Hepburn, Elkins and Interstate Commerce Acts should be enforced where such a result would be reached.

We also call attention to the fact that the Circuit Court of Appeals certified that the shipper was acting in good faith and without collusion.

Will the Federal Court in the future pass upon the question as to whether the shipper and carrier are both acting in good faith without collusion in all actions brought to recover transportation charges in which counterclaims have been interposed? The task would seem to be a burdensome one. All of the decisions of the United States Supreme Court, prior to the Lindell case, apparently have aimed to separate the matter of disposition of transportation charges from all other controversies between shippers and carriers. This Honorable Court, the Interstate Commerce Commission and Congress have indicated that transportation charges should be promptly paid in money and not complicated by negotiations on unliquidated claims or paid in anything other than money.

We believe the Lindell case should be and will be construed by the United States Supreme Court to apply only to a case in which the state statute requires the counterclaim to be brought in the same suit, where the Federal Court has specifically found both shipper and carrier to be acting in good faith and without collusion and where the loss and damage occurs on the identical shipment and the

carrier therefore has failed to fully comply with its contract of carriage.

In the instant case the contract of shipment was complete while it was not complete in the Lindell case.

In the Lindell case the shipment was partially lost and damaged and, therefore, the freight charges were not fully earned because the carrier had failed in the performance of his contract to deliver the shipment without loss or damage.

In the instant case the weight apparently was incorrectly given on the bill of lading and respondent's Overcharge Department, believing all the charges had been paid, as well as an excess of $4.26, in error paid the petitioner $4.26 (R. 36). Whether the claim for $4.26 covered incorrect weight or loss of coal in transit is immaterial because the petitioner in its answer conceded that prior to the commencement of the suit here involved the petitioner's claim had been fully paid. The following is a portion of Paragraph IV of defendant's answer:

> "Admits that a carload of coal was transported substantially as alleged in Paragraph VIII of said Complaint, in subparagraphs one and two of said Paragraph VIII, except that defendant denies that said car was duly transported and alleges that the manner and form in which the same was transported by plaintiffs or their agents was negligent and caused loss and damage thereon *and that said loss and damage was paid for by plaintiffs.*"

In the Lindell case the carrier had not placed itself in a position for full and complete payment of the charges while the plaintiff in the instant case has.

The legal obligation upon the shipper or consignee and the carrier alike, to have freight charges paid in full within ninety-six hours from the time of delivery of the shipment to the consignee, remains an unqualified obligation where the shipment is delivered safely and undamaged as in the instant case and the time limit may not lawfully be extended beyond the ninety-six hours in order to liquidate a setoff before paying the tariff charges. The same legal obligation to pay tariff charges within ninety-six hours would not seem to obtain where, as in the Lindell case, the tariff charges were not fully earned because of the failure of the carrier to deliver all of the shipment without loss or damage thereto.

In a majority of cases involving claims for loss or damage arising on shipments moving over several different railroad carriers the suit is brought against the initial carrier. Actions for freight and demurrage charges on behalf of all railroads participating in the carriage of the goods is customarily brought by the delivering carrier. The result in the past has been that the claim for freight and demurrage charges and the claims for loss and damage to the shipment have been negotiated by the owner of the goods with different railroad companies. This creates no hardship on the shipping public as the Carmack and Newton Acts respectively permit actions to be commenced against either the originating or destination carrier and the carrier sued is responsible for the acts of all other carriers.

If counterclaims are permitted to be interposed in actions for freight and demurrage charges a great many shippers may refuse to pay transportation charges, which are fixed by tariff provisions, until unliquidated claims for loss and damage are disposed of in a manner satisfactory to them. The Interstate Commerce Rule *Ex Parte No. 73* will, to a considerable extent be nullified and we believe the entire web

and woof protecting the small shippers under the Elkins Act will be to a substantial extent destroyed.

One of the decisions which we feel is very persuasive as showing that permitting counterclaims generally to be interposed in actions for transportation charges will violate Section 1 of the Elkins Act is the case of *Hocking Valley Railway Co. vs. United States*, decided by the Circuit Court of Appeals of the Sixth Circuit, reported in 210 Fed. 735, Writ of Certiorari denied, 234 U. S. 757, and we take the liberty of quoting rather extensively from that decision. On page 740 the court said:

> "Upon the broad and underlying question whether it is such discrimination as is forbidden by the Elkins Act, in force in 1909, for the carrier to insist that shippers generally pay cash while it gives long credit to another similar shipper, and gives such credit pursuant to a previous contract—upon this broad question, we have no doubt. Such conduct, by its very terms, is discrimination. Shippers are not treated alike. Giving to one shipper four months' time in which to raise the money, even if interest is added, while the same privilege is denied to others, is plainly a 'concession of discrimination.' It also must be considered a concession or discrimination 'in respect to transportation'; it cannot be thought that these two words in this clause of the Elkins Act pertain only to a facility of transportation; they are used in immediate connection with 'rebate,' and so the clause must be intended to reach and affect the subject of freight payments. Whether, by this concession, it results that the property is 'transported at a less rate than that named in the tariffs' is not important, because the statutory condemnation extends also to concessions 'whereby any other advantage is given or discrimination

is practiced.' Such a discrimination might or might not be of pecuniary value to the freight payer. It is conceivable that a shipper, with sufficient working capital upon which he could not otherwise earn 5 per cent, would save money by paying cash; but it is clear that such a system of freight credits amounts to loaning money to the shipper, and is equivalent to providing for him working capital. To say that this cannot be considered a concession, or, when unfairly practiced, a discrimination, is, we think, to deny to these words their plain meaning."

On page 741 the Court said:

"Not only is the conclusion that the described practice does constitute that discrimination against which this provision is directed the natural inference from the words of the statute, but the general purpose of the law and of the amendments hereto be enforced, as repeatedly declared by the Supreme Court, indicates the same broad interpretation; if, indeed, there is in the word 'discrimination' ambiguity to be construed."

On page 743 the Court further said:

"Our conclusion here is not affected by these queries as to just how far the thought of unreasonableness still inheres in the proper definition of 'discrimination' under the Elkins Act. In the instant case, the four months' credit given to one favored shipper, and then extended for longer periods, was a material and substantial distinction. It was of that character which might permit the favored shipper to continue in business and drive all others out of business. It is obvious that if continued it might rapidly accumulate into a very large sum."

As we read the Lindell case, the Court has not passed upon the question as to whether the allowance of a right of setoff was contrary to the Elkins Act. Clearly a shipper can obtain a concession or advantage by means of a setoff. He can refuse to pay freight charges and eventually force the carrier to bring suit for them. When suit is started he can further postpone the date of paying his freight bill by filing a setoff. The net result often is that he obtains advantages or concessions amounting to credit, all of which is pointed out in *Hocking Valley Railroad Co. v. United States, supra.*

In that case it was held that the mere giving of four months' credit when interest was added, when the same right was not given to other shippers, constituted a concession or discrimination in violation of the Elkins Act.

A carrier who wished to help finance a shipper could easily arrange to have a damage claim filed and use this, together with the possibility of getting a setoff, as an excuse for failing to insist upon prompt payment of the freight charges.

In this and many other states interest can, of course, be recovered. The legal rate varies in different states. As we understand the rule in some states, it cannot be recovered. For instance, in Illinois it can only be recovered where the plaintiff has proved an unreasonable or vexatious delay, a matter which, of course, is difficult to prove. In many cases the value of freight money to the shipper as working capital exceeds the legal rate of interest.

In those cases where the freight bill is greater than the damage claimed in the setoff, the shipper does not come into court with clean hands when he has not paid or tendered the difference and courts should not put their stamp of approval on the practice. Even in those cases where the freight bill is less than the damage claim, under the law

of averages the shipper will be wrong fifty per cent of the time. In those cases where the shipper is wrong intentionally or through mistake of facts or law, he obtains a discrimination or advantage in violation of the Elkins Act and he has not in reality paid the full tariff charges. The tariff charges are made up with the idea that the freight must be paid upon delivery, or shortly thereafter, and if a shipper can by the device of a setoff, or threat of one, postpone for several years the time of payment, he is not paying what the law requires because he is paying the tariff amount less the value of the freight money for working capital.

A limited number of shippers only are in a position to file setoffs. The only shippers who can do so are those who are undercharged, consignees on the credit list, and consignors and the last reconsignor of shipments which are refused or unclaimed at destination. All other shippers are required to pay their freight bills before they can get the property. In many cases the prepayment of charges is made at point of origin. The small shipper with poor financial standing is not put upon the credit list and in order to get the shipment, must pay cash upon delivery, while his competitor with ample credit, who is upon the credit list, under the rulings of the Interstate Commerce Commission, may obtain the shipment without a payment and after obtaining the shipment refuse to pay the charges until a claim for damages, which may or may not be meritorious, is paid. The allowance of the right of setoffs or counterclaims, therefore, would work a discrimination between shippers—a few are in position to take advantage of a counterclaim, while most are not.

From a practical standpoint we believe all railroad attorneys know and most men whose duty it is to collect tariff charges know that many shippers employ the threat

of setoffs and also threats of routing business against the carrier to force favorable settlements of their damage claims. Most, if not all, railroads entirely separate and segregate their departments handling overcharge and undercharge claims from the Claim Department handling loss and damage claims. Railroad attorneys, we believe, generally insist that negotiations of undercharge and overcharge claims be entirely distinct and separate from the consideration of any other claims. This, we believe, is nearly essential in order that the purposes of the Interstate Commerce Act and the Elkins Amendment thereto may be complied with as at present.

Apparently the decisions permitting counterclaims are based upon the matter of convenience. The argument of convenience advanced does not seem to us to be sound. The allowance of setoffs and counterclaims will not save the courts' time for there rarely is occasion for two lawsuits. The amount of the transportation charges is fixed by the tariffs and is seldom in dispute, and in the few cases where there is an honest dispute, there almost never is the coincidence of a damage claim on the shipment.

The allowance of setoffs, therefore, burdens the courts not only with the damage claim but also with the claim for freight charges. The same evidence does not suffice for both claims.

Congress, for the convenience of the shippers, has seen fit to make both the initial and destination carriers responsible for the acts of all other carriers participating in the shipment. Independent of statute such right would not exist. Shippers, therefore, in actions against railroads, hold a favored position and do not require the right of counterclaim urged by the petitioner.

In *New Orleans & N. E. R. Co. vs. Harris*, 247 U. S. 367,

38 Sup. Ct. 535, at 536, in an action brought under the Federal Employers' Liability Act, it was held:

> "The question of burden of proof is a matter of substance and not subject to control by laws of the several states."

The question of interposing counterclaims in actions brought to recover tariff charges involves the matter of compliance with the provisions of the Elkins Act and should not be subject to control of the several states.

At common law the right of setoff and counterclaim did not exist except to the limited extent that recoupment was permitted. A state statute of procedure which permits the interposition of setoffs or counterclaims should not be permitted to nullify in any degree the intention of Congress to prevent discrimination as between shippers as set out in the Interstate Commerce Act and the Elkins and Hepburn amendments thereto.

CONCLUSION.

It is respectfully submitted that the check in question was handled in a manner authorized by the petitioner on the check in that it was "Collectible at par through the Federal Reserve Bank at Minneapolis." That freight charges can be paid in money only and that a check is not money. That an obligation rests upon the petitioner which is equal to the obligation of the respondent to see that freight charges actually are paid in money. That permitting counterclaims to be interposed in suits brought to recover outstanding freight charges will interfere with the uniform collection of cash charges from all shippers, will unduly extend credit to some shippers and will open the door to discriminations under color of counterclaims and offsets.

In the instant case the contract of carriage was complete before suit was brought while this was not true in the Lindell case. The shipment in this case had been delivered at destination before the subject of counterclaim had arisen and the counterclaim did not involve the contract of carriage. In the Lindell case the counterclaim was for loss and damage on the identical shipment and, therefore, did involve the contract of carriage. The Minnesota statute, relating to counterclaims, unlike the California statute, is permissive only. The interposition of counterclaims is not essential to the convenience of either the shipper or the courts.

It is respectfully submitted that the Honorable Circuit Court of Appeals for the Eighth Circuit correctly decided this case and its action should be affirmed.

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APPENDIX.

Section 2 of the Interstate Commerce Act as amended. Section 2, Title 49, U. S. C., reads as follows:

"2. Special rates and rebates prohibited.—If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, C. 104, §2, 24 Stat. 379; Feb. 28, 1920, C. 91, §404, 41 Stat. 479.)"

Section 3 of the Interstate Commerce Act as amended contains the following (Sec. 3, Title 49, U. S. C.):

"3. Preferences, interchange of traffic, terminal facilities.—

"(1) Undue preferences or prejudices prohibited.—It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect

whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"(2) Payment of freight as prerequisite to delivery. —No carrier by railroad subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: Provided, that the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia."

Sec. 1 of the Elkins Amendment to the Interstate Commerce Act (Sec. 41, Title 49, U. S. C.) reads as follows:

"Section 41. Liability of corporation carriers and agents; offenses and penalties.— (Italics my own.)

"(1) Liability of corporation common carriers, offenses, penalties, jurisdiction. — Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under Sections 41, 42, or 43, shall also be held to be a misdemeanor committed

by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by Sections 41, 42 or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter *whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant or give, or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor*, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: Provided, that any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42 or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addi-

tion to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"(2) Liabilities for acts of agents; departure from published rates.—In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under Sections 41, 42, or 43, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

"(3) Receiving rebates; additional penalty and recovery thereof.—*Any person*, corporation, or company who shall deliver property for interstate transportation

to any common carrier, subject to the provisions of Sections 41, 42, or 43, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, *who shall* knowingly by employee, agent, officer, or otherwise, directly or indirectly, *by* or through *any means* or device *whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration* as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be. (Feb. 19, 1903, c.

708, §1, 32 Stat. 847; June 29, 1906, c. 3591, §2, 34 Stat. 587.)"

The Heburn Amendment to the Interstate Commerce Act contains the following in Subdivision 7, Sec. 6, Title 49 U. S. C.:

"(7) Transportation without filing and publishing rates forbidden; rebates; privileges.—No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Minnesota statutes relative to counterclaims:

Sec. 7756 of *1913 General Statutes of Minnesota*, Sec. 9253 *Mason's Minnesota Statutes for 1927* contains the following:

"7756. The action shall contain: * * * (2) A statement, in ordinary and concise language, of any new matter constituting a counterclaim or defense. * * *."

Sec. 7757 of *1913 General Statutes of Minnesota*, Sec. 9254 *Mason's Minnesota Statutes for 1927*, reads as follows:

"7757. Requisites of a counterclaim.—Pleading does not admit.—The pleading of a counterclaim shall not be construed as an admission of any cause of action alleged in the complaint. Such counterclaim must be an existing one in favor of a defendant and against a plaintiff, between whom several judgments might be had in the action, and must be:

"1. A cause of action arising out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; or

"2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun."

Sec. 7758 of *1913 General Statutes of Minnesota*, Sec. 9255 *Mason's Minnesota Statutes for 1927*, reads as follows:

"7758. Several defenses, etc., how pleaded—answer and demurrer.—The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed. He may also demur to one or more of several causes of action in the complaint and answer to the remainder."

Ex Parte No. 73:

"Order.

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of June, A. D. 1930.

"*Ex Parte* No. 73.

"*In re* Section 3 of the Interstate Commerce Act, as

amended by Section 405 of the Transportation Act, 1920.

"*It appearing*, that Section 3, Paragraph (2) of the Interstate Commerce Act, as amended by Section 405 of the Transportation Act, 1920, provides:

"From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination; *Provided*, that the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

"*It further appearing*, that a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, that the following rules and regulations be, and they are hereby prescribed to become effective on July 1, 1920, and to remain in force until the further order of the Commission:

"1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be

sufficient to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being herein called shippers, for a period of ninety-six hours to be computed as follows:

"(A) Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight, the ninety-six hours of credit shall run from the first 4:00 P. M. following the delivery of the freight.

"(B) Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the ninety-six hours of credit shall run from the first 4:00 P. M., following the presentation of the freight bill.

"2. Every such carrier shall present freight bills to shippers not later than the first 4 P. M. following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 4 P. M. following the day upon which sufficient information becomes available to the delivering agent of the carrier.

"3. Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

"4. Sundays and legal holidays, other than Saturday

half holidays, may be excluded from the computation of the period of credit.

"5. The mailing by the shipper of valid checks, drafts or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time."

SUPREME COURT OF THE UNITED STATES.

No. 47.—October Term, 1930.

Fullerton Lumber Company, Petitioner, *vs.* Chicago, Milwaukee, St. Paul & Pacific Railroad Co.	On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 24, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Chicago, Milwaukee, Saint Paul & Pacific Railroad Company brought this action in the federal court for Minnesota to recover from the Fullerton Lumber Company freight charges on a carload of coal shipped to it. The case was tried without a jury. The defence was payment. It appeared that, upon delivery of the car, the carrier had, as customary, accepted the defendant's check on a local bank for the amount of the charges; that it had delayed presenting the check for payment; and that meanwhile the bank had failed. The defendant contended that it was relieved from liability because of the carrier's unjustifiable delay in presenting the check. The trial court ruled that the Interstate Commerce Act requires that a carrier's charges be paid strictly in currency; and that since the check had not been paid, the defendant was liable even if the carrier's failure to receive the money was due wholly to its own negligence. Judgment entered for the carrier was affirmed by the Circuit Court of Appeals. 36 F. (2d) 180. This Court granted a writ of certiorari. 281 U. S. 709.

It has long been settled that payment of a carrier's charges must be made in money; and that the payment must be cash as distinguished from credit.[1] The purpose of the requirement is solely to

[1]Conference Ruling No. 207 of Interstate Commerce Commission (September 15, 1906); Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 476; Chicago, Indianapolis & Louisville Ry. Co. v. United States, 219 U. S. 486; Chicago & North Western Ry. Co. v. Lindell, 281 U. S. 14, 16. Compare Ex parte No. 73, 57 I. C. C. 591, 596; 63 I. C. C. 375; 69 I. C. C. 351. Rules

prevent rebates or unjust discrimination and to ensure observance of the tariff rates. Compare *Chicago & Northwestern Ry. Co.* v. *Lindell*, 281 U. S. 14, 16. The Interstate Commerce Act does not in terms prescribe that the charges shall be paid in money; that is, in coin or currency. There is no reason for denying to the parties the convenience and safety incident to making payment, in accordance with the prevailing usage of business, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.

Whether in the case at bar the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of law generallly applicable to payment by check. These, and other questions which have been argued, need not be considered by us.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

promulgated June 4, 1920, permitted the carrier to extend credit for ninety-six hours after delivery, and provided that "the mailing [within this prescribed period] by the shipper of valid checks, drafts, or money orders which are satisfactory to the carrier," should be deemed proper payment. Ex parte No. 73, Rule 5, 57 I. C. C. 596a, 596b.